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of Justice
(Provincial Division)

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Justice

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Ministry of
the Attorney
General

REPORT

OF THE

CRIMINAL JUSTICE

REVIEW COMMITTEE

Co-Chairs:

The Honourable Mr. Justice Hugh Locke

The Honourable Senior Judge John D.Evans

Murray Segal, Assistant Deputy Attorney
General, Criminal Law Division, Ontario
Ministry of the Attorney General

February, 1999

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Committee Member

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THE CRIMINAL JUSTICE REVIEW COMMITTEE

The Honourable R. Roy McMurtry, Chief Justice of Ontario
The Honourable Patrick J. LeSage, Chief Justice (General Division)
The Honourable Sidney B. Linden, Chief Judge (Provincial Division)
The Honourable Charles Harnick, Attorney General for Ontario

Dear Sirs:

The undersigned are pleased to present the *Report of the Criminal Justice Review Committee*. Over the past fifteen months we have developed a series of inter-related practical recommendations to increase the efficiency of the criminal courts. These recommendations endeavour to recognize the needs of the criminal justice system while protecting the rights of those involved in that system and addressing the obligations of those who are required to make the criminal justice system work. An essential prerequisite to implementing these proposals is the availability of adequate and predictable resources for the courts, the Ontario Legal Aid Plan and the prosecution services. These recommendations endeavour to reflect the various perspectives brought to the issues examined. Although, not surprisingly, some recommendations do not reflect the unanimous view of all committee members, the signatories support the overall direction and goal of this Report.

Mr. Justice Hugh Locke

Senior Judge John D. Evans

Murray Segal
Co-Chairs

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Committee Member

Joe De Filippis
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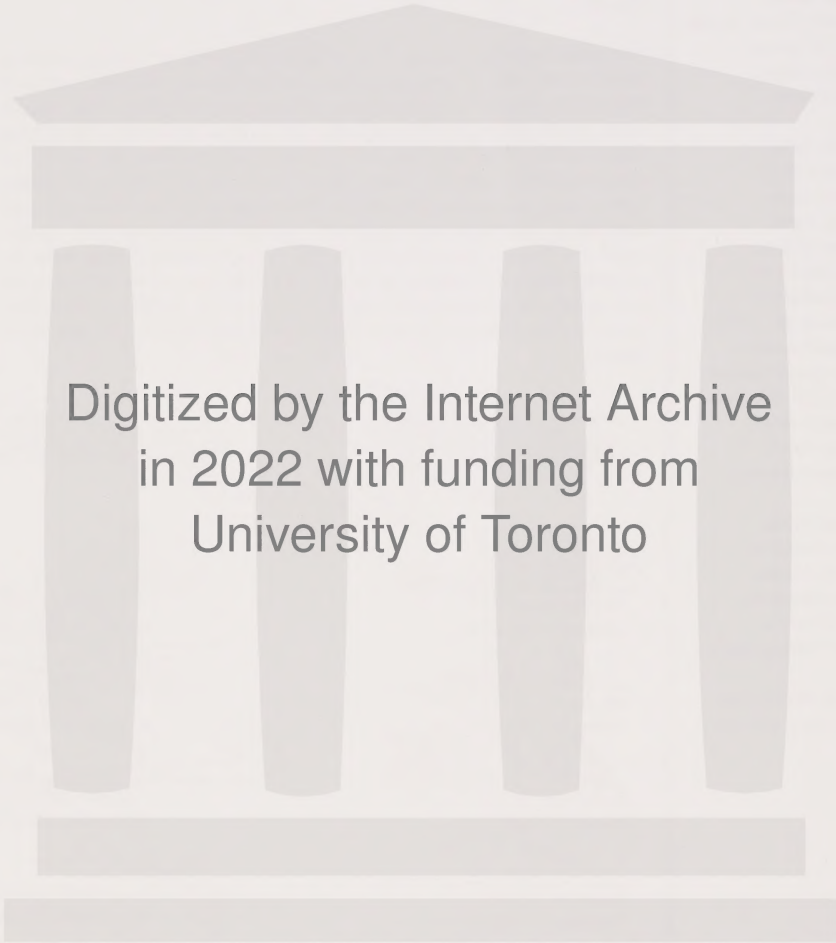

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CHAPTER ONE: INTRODUCTION

We are not disposing of cases quickly enough...Trials are taking much too long. We must find some way to make trials more efficient.[1]

This Criminal Justice Review was established in October 1997 to review the operation of the criminal justice system in Ontario and recommend measures to combat delay and inefficiency. The 1990 *Askov*[2] decision of the Supreme Court of Canada focused public attention on the question of delay in criminal cases. As a result of that decision, almost fifty thousand criminal charges in Ontario were dismissed because of "unreasonable delay" under the *Canadian Charter of Rights and Freedoms*.[3]

The Martin Committee, formally entitled the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions,[4] was established shortly after the *Askov* decision. It released a landmark report in 1993 containing a large number of excellent recommendations. The implementation of many of these recommendations has significantly enhanced the administration of criminal justice in Ontario. This report will point out, however, that not all of the recommendations of the Martin Committee have been fully implemented.

Delay continues to challenge the administration of criminal justice in Ontario. In November 1996 a criminal court blitz was initiated by the Attorney General, in cooperation with the judiciary and

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[1]Chief Justice Patrick J. LeSage, quoted in the news release from the Ontario Ministry of the Attorney General (9 October 1997) announcing the establishment of the Criminal Justice Review.

[2]*R. v. Askov*, [1990] 2 S.C.R. 1199; (1990), 59 C.C.C. (3d) 449; (1990), 79 C.R. (3d) 273.

[3]Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. Section 11(b) of the *Charter* provides: "Any person charged with an offence has the right... to be tried within a reasonable time".

[4]Ontario, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Toronto: Queen's Printer, 1993) (Chair: G.A. Martin)[hereinafter *Martin Committee Report*].

the defence bar, to reduce the backlog in six of the most congested court locations in the province. This infusion of additional resources alleviated the immediate problem. However, as this report will outline, we believe some structural changes to the criminal justice system are also required.

This Review amplifies the work of the Martin Committee in seeking ways to improve the speed and efficiency of criminal proceedings, while respecting the rights of the accused, the expectations of victims, and the needs of society. Our Terms of Reference were as follows:

> ***The focus of the committee's recommendations will be on practical solutions to increase the efficiency of the criminal courts, further reduce the delay in bringing matters to trial, and shorten trials. Short and long-term solutions will be considered, including improved use of resources and possible streamlining within the following key areas of the criminal justice system: (a) pre-trial and release proceedings; (b) remand and set date process; (c) disclosure and pre-trial resolutions; and (d) trial procedures.***[5]

This Review was initiated by Chief Justice LeSage, Chief Judge Linden, and the Honourable Charles Harnick, Attorney General, and is a combined initiative of the judiciary, the Ontario Ministry of the Attorney General, and the Ontario Criminal Lawyers' Association. The committee is co-chaired by the Honourable Senior Judge John D. Evans of the Ontario Court of Justice (Provincial Division), the Honourable Mr. Justice Hugh Locke of the Ontario Court of Justice (General Division), and Murray Segal, Assistant Deputy Attorney General, Criminal Law Division, Ontario Ministry of the Attorney General.

The members of the Criminal Justice Review Committee are: Garth Burrow, Q.C., Crown Attorney, Stratford; Joe De Filippis, Executive Legal Officer of the Ontario Court of Justice (General Division); Bruce Durno, former president of the Ontario Criminal Lawyers' Association, now a judge of the Ontario Court of Justice (General Division); Doug Ewart, counsel in the Department of Justice (Canada); Irwin Koziebrocki, Vice-President of the Ontario Criminal Lawyers' Association; Robert Holden, Provincial Director of the Ontario Legal Aid Plan; David Littlefield,

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[5] See: Appendix A.

counsel in the Department of Justice (Canada); the Honourable Mr. Justice Michael Moldaver of the Ontario Court of Appeal; Barbara Stewart, Director of Court Operations, Central East Region, Ontario Ministry of the Attorney General; Her Worship Carolyn Robson, a former Senior Regional Justice of the Peace, now retired; Her Worship M.A. Opal Rosamond, Senior Advisory Justice of the Peace; and Sarah Welch, the President of the Ontario Crown Attorneys' Association.

The research and writing of the report was ably assisted by John Pearson, Aimée Gauthier, and Lorna Bolton, counsel in the Ontario Ministry of the Attorney General; Robert Goldstein, counsel in the Department of Justice (Canada); and in the later stages of the review by Professor Martin Friedland of the Faculty of Law, University of Toronto; and Theresa Miedema, a third year law student in the Faculty of Law, University of Toronto.

The full committee met formally on eighteen occasions. There were, of course, many additional meetings of subcommittees. Before formulating its recommendations, the committee invited interested members of the public, criminal justice stakeholders, and the judiciary to share their thoughts and ideas on how the criminal justice system could be improved. The response to the request for submissions was extremely positive. In total, sixty-five very thoughtful submissions were received and are listed in Appendix B. The committee would like to take this opportunity to thank the many people who wrote to the committee or who otherwise assisted the research group with its work. The willingness of those involved in the criminal justice system to seriously consider the need for change is very encouraging.

In mid-June 1998, the Co-chairs met with the research and writing staff for three intensive days of work to consider the many issues that had to be addressed in the report. Subsequent meetings with the full committee further refined the possible solutions. In making our recommendations, we have made every effort to balance and reflect the various perspectives brought to the issues canvassed by the committee, although inevitably there remain a few recommendations which reflect a majority rather than a unanimous view. The overall direction of the report is, however, strongly supported by all signatories.

1. DELAY

Delay is always a matter of great concern to the criminal justice system. Lengthy periods of delay are unfair to accused persons who may want the charges resolved at an early stage, and are the cause of further anxiety to victims. Delay undermines the pursuit of justice within the system as memories fade and witnesses disappear. It also disrupts the lives of witnesses and jurors and increases the cost of the criminal justice system to the taxpayer. Historically, the criminal process in Canada has been relatively speedy. By conducting trials soon after an offence was committed, our justice system was able to deter acts of vigilantism, to earn public confidence, and to enhance the deterrent effect of a conviction and sentence.

Delay also harms the process of justice by creating even more delay. Unnecessary appearances and adjournments, bail hearings when the accused should have been released by the police, weak cases that should have been screened out of the system by the police or the Crown, failure to provide adequate and timely disclosure, the lack of courtrooms, overworked prosecutors and unrepresented accused, perfunctory pre-trial conferences, inadequately prepared counsel, lack of appropriate judicial direction and control - to give only a few examples - unnecessarily clog the system and cause even greater backlogs. Ironically, lengthy applications for a stay of proceedings because of "unreasonable delay" also contribute to further delay.

This Review has examined each stage of the criminal process to determine whether changes in present practices would improve the system. We have not examined police practices, in particular the decision by the police to lay charges. It must be recognized, however, that this is a crucial component in the delay equation. If the police are given greater resources to lay more charges without a commensurate increase in resources to other parts of the system - courts, judges, prosecutors, legal aid, etc. - one can expect backlogs and bottlenecks as the system struggles to cope with the increased demand.

Nor have we examined the legislative process, although it must be recognized that legislative changes frequently affect the efficiency of the courts[6]. Consequently, whenever legislative changes are contemplated, there is a need for close analysis of the impact of the changes before they are made. There is always the potential for serious disruption of the criminal justice system when legislative change is implemented without careful consideration of its impact.

Changes in the delivery of health and social services also impact on the operation of and demands on the criminal courts. For example, the closure of psychiatric facilities has resulted in increased numbers of mentally disordered persons appearing before the courts. As we discuss in Chapter Eleven, the Ontario Ministries of the Attorney General and Health and the Ontario Court (Provincial Division) have established Canada's first consolidated mental health court in 102 Court at Old City Hall, Toronto, to provide a centralized facility for mentally disordered persons who come into contact with the criminal justice system.

2. CO-OPERATION AND CO-ORDINATION

The need for increased co-operation and co-ordination amongst the various relatively independent parts of the criminal justice system – the police, prosecutors, private defence counsel, legal aid, the judiciary, and the Attorney-General's department - is a major theme of this report. Chapter Eleven examines this crucial issue and recommends the establishment of a provincial criminal justice co-ordinating committee and local criminal justice co-ordinating committees.[7] Effective ways to address the previously-mentioned demands created by an increase in police resources, for example, could be discussed in such forums.

We also suggest in Chapter Eleven that the Joint Heads of Court and Attorney General Committee continue to consider the establishment of an independent Court Services Agency, with authority to

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[6]A new "general part" of the *Criminal Code*, for example, could help define the mental element of offences and the availability of defences, thereby avoiding time consuming legal arguments and complicated jury instructions.

[7]See Recommendations 11.1 - 11.8.

make changes to improve the efficiency of the criminal justice system. A Court Services Agency could facilitate greater co-operation between the Attorney-General's Ministry and the judiciary, who now share responsibility for the administration of the court system. It could also increase co-operation between judges of the General and Provincial Divisions of the Ontario Court of Justice. There is a clear consensus amongst the judiciary and criminal justice stakeholders that greater co-operation will enhance efficiency.

3. RESOURCES

The many recommendations made in subsequent chapters will only be effective if the criminal justice system is allocated adequate resources. In the chapter on legal aid, for example, we point out that unrepresented accused tend to cause delay in the system. Adequate resources for legal aid are, therefore, clearly necessary.

Adequate court facilities are also required. The best system cannot work effectively if suitable court facilities are not available and, consequently, trials and other hearings have to be adjourned. We note that the Ontario Ministry of the Attorney General has embarked on an ambitious capital funding project for court facilities such as the new courthouses in Brampton, Brockville, Cornwall, Hamilton and Windsor.

Adequate funding of the prosecution services is equally important. Many of the delay-reducing steps that we recommend are dependent on the availability of a reasonable number of experienced prosecutors. Prosecutors are required to handle charge screening, to prepare for bail hearings, to give timely disclosure to the defence, to have conferences with defence lawyers, to conduct meaningful pre-trial judicial conferences, and to prepare for, and conduct, preliminary inquiries and trials.[8]

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[8]We note that the prosecution service resource requirements identified in the *Martin Committee Report* have not been fully provided (see Appendix L to the *Martin Committee Report, supra* at 497-523).

1.1 The Criminal Justice Review Committee recommends that adequate and predictable resources be provided to the courts, the Ontario Legal Aid Plan, and the prosecution services.

4. INFORMATION TECHNOLOGY AND STATISTICS

At present, there are two different statistical systems operating in the province's criminal courts. The first, the Integrated Courts Offences Network or "ICON", services the Provincial Division and the second, the Court Input Statistical System or "CISS", services the General Division. Although we have not undertaken a thorough analysis of these statistical systems, it has become apparent during the course of our work that the current systems are not working well. Without adequate statistics, policy recommendations are based on anecdotal evidence and insufficient information. Indeed, throughout this review we felt hampered by the unavailability of reliable statistics.

The Ontario government is implementing an ambitious integrated information technology system to be used by the police, Crown and judiciary [the Integrated Justice Project]. We hope the system will be capable, amongst other things, of generating reliable statistical information regarding the operation of the province's criminal courts. While a paperless criminal justice system may be difficult to imagine, there are overwhelming reasons for adopting a fully integrated information technology strategy. In particular, we believe that "the criminal justice process needs to be seen as a whole, as one process not several" and that "there are large savings to be made in time and money from information technology systems based on common information flows in which each agency utilises and manipulates the data it needs for the benefit of all."[9]

1.2 The Criminal Justice Review Committee recommends that the Integrated Justice Project develop a system which is capable, amongst other things, of generating reliable statistical information regarding the operation of the criminal courts in the province. Ideally, the new system will:

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[9]U.K., *The Review of the Crown Prosecution Service: A Report* (London: HMSO, 1998) at 183 (Chair: Rt. Hon. Sir Iain Glidewell).

- **be simple to use;**
- **be capable of generating statistical information on both a per charge and per case basis;**
- **be capable of automatically compiling statistical information (e.g. without requiring that the data be manually inputted into a separate statistical database); and**
- **service both divisions of the Ontario Court of Justice as well as the Ontario Court of Appeal.**

It would be useful if the system was:

- **capable of maintaining a record of cases which were adjourned because they were not reached or because there was no court space available (this information could be used to identify overburdened courts);**
- **able to sort information by offence category (e.g. sexual assaults, domestic assaults, and impaired driving offences);**
- **capable of identifying the next available trial date in both Provincial and General Division in each court location. This would allow judicial pre-trials in General Division to be scheduled at the time of committal in Provincial Division, thus obviating the need for a set date appearance in General Division; and**
- **able to identify and track appellate cases (both summary conviction and indictable) which raise common legal issues (this information could then be used to consolidate similar cases and to identify test cases).**

5. COURT TRANSCRIPTS

We received several submissions regarding delays in the production of court transcripts. Concerns were expressed to us that these delays can disrupt court proceedings. For example, hearings have been delayed in the Court of Appeal and proceedings interrupted in trial courts because transcripts were not available. We understand that, in the short term, the Ontario Ministry of the Attorney General is addressing delays in the production of court transcripts by increasing the number of court reporters, particularly in Toronto, and by ensuring that court reporters are fully trained to perform their important duties. The Ministry has identified the expeditious completion of court transcripts

as a priority and established a protocol to speed up the completion of outstanding transcripts. In the longer term, as technological solutions are sought to produce automated court records, the production of court transcripts will be addressed by the Integrated Justice Project. We encourage the Integrated Justice Project to address this important issue on a priority basis.

6. DIGNITY OF COURT PROCEEDINGS

We end this introduction with a further concern. The committee is struck by the casualness and informality of many court proceedings. This tends to breed disrespect for the administration of justice and may well have an adverse effect on the efficiency of the court system. Dignity is important to the preservation of the "solemn ritual" of court proceedings.

> Criminal law operates at three different stages. At the law making stage it denounces and prohibits certain actions. At the trial stage it condemns in solemn ritual those who commit them. And at the punishment stage it penalizes the offenders. This, not mere deterrence and rehabilitation, is what we get from the criminal law - an indirect protection through bolstering our basic values.[10]

It is important that judicial proceedings be conducted with a formality which dignifies the process and impresses the parties with the care and concern of both the court and society, regardless of the result. It is essential that the accused, the complainant, witnesses, and jurors leave the court feeling they received the consideration and respect to which they are entitled. Our courts must be seen as places of careful reflection and justice.

We have not studied how to create greater dignity in the court system - although many of us have ideas - whether it be strict adherence to court starting times, the attitude and deportment of the staff, the manner in which the participants address the court, or the tone created by the judge, to give only some examples. This is a matter that could be discussed in greater depth by the proposed provincial criminal justice co-ordinating committee and the proposed local criminal justice co-ordinating committees[11].

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[10]Law Reform Commission of Canada, *Our Criminal Law* (Ottawa: Information Canada, 1976) at 27.

[11]See: Recommendations 11.1 - 11.4.

1.3 The Criminal Justice Review Committee recommends that the proposed provincial criminal justice co-ordinating committee and the proposed local criminal justice co-ordinating committees consider ways of enhancing the dignity of court proceedings.

CHAPTER TWO:
BAIL

> *It is desirable that every accused awaiting trial be released on bail, unless the desirability of releasing the accused is out-weighed by the public interest. The detention of the accused while awaiting trial may unfairly damage a person who is subsequently acquitted and may unnecessarily damage a person who is subsequently convicted.*[12]

1. INTRODUCTION

The decision whether or not to release an accused person pending trial is one of the most important decisions made during the course of criminal proceedings. Erroneous decisions can have tragic consequences, not only for complainants and defendants, but also for members of the general public. Hence, while it is important that efforts be made to improve the efficiency of bail courts, efficiency must not be achieved at the cost of public safety or fairness to the individual.

2. POLICE POWERS OF RELEASE

Sections 496 to 500 of the *Criminal Code* empower the investigating officer or the officer-in-charge to release a suspect on a summons, appearance notice, promise to appear, recognizance or undertaking.[13] Concerns have been expressed to us that the police do not always make full use of their statutory release powers in appropriate cases. There also appears to be considerable variation across the province with respect to the number of suspects released by the police prior to trial.[14] Unfortunately, it is not possible to determine on the available information whether this is because some police forces are not making appropriate use of their pre-trial release powers. On the other

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[12] *Report of the Canadian Committee on Corrections - Towards Unity: Canadian Justice and Corrections* (Ottawa: Queen's Printer, 31 March 1969) at 101 (Chair: R. Ouimet).

[13] Forms 6, 9, 10, 11 and 11.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, respectively.

[14] Ontario, *Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services, Volume 1* (Toronto: Queen's Printer, 1997) at 93 - 94 (Chair: J.D. McCamus).

hand, it must be recognized that the police have a significant challenge to balance the power to release with other essential interests, including safety of victims and the public.

There can be no doubt, however, that unnecessarily detaining a suspect for a bail hearing is both unfair to the individual and costly to society. It costs approximately $140 per day to incarcerate an inmate.[15] The figure is significantly higher when the costs of prisoner transport, court and Crown operations, duty counsel, and judicial salaries are included.

Detention is also costly from the accused's perspective. The negative consequences of pre-trial imprisonment may include: loss of income / employment; dislocation from family and friends; and physical / psychological hardship arising from the conditions of detention. Pre-trial detention may also have an affect on the outcome of the trial.

Having regard to these costs from both the perspective of the public and the accused, the police should detain only those individuals who pose a danger to society, are a flight risk, or whom the police have no authority to release. We believe the issue of pre-trial release by the police warrants further detailed study.

2.1 The Criminal Justice Review Committee recommends that the Ontario Ministry of the Solicitor General and Correctional Services examine the exercise of police pre-trial release powers across the province to determine whether greater use could be made of the release powers conferred on the police by the *Criminal Code*.

2.2 The Criminal Justice Review Committee recommends that the Ontario Ministry of the Solicitor General and Correctional Services report the results of the above study to the proposed provincial criminal justice co-ordinating committee for whatever further action that committee considers appropriate.

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[15] Ontario, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer, 1995) at 169 (Chairs: D. Cole and M. Gittens) [hereinafter *Cole / Gittens Commission Report*].

3. JUDICIAL INTERIM RELEASE PROCEEDINGS

Part XVI of the *Criminal Code* governs the pre-trial release of accused persons by a judge or justice of the peace. Pursuant to 503(1) of the *Criminal Code*, an accused person who is charged with an offence other than an offence enumerated in s. 469, and who is detained by the police following his or her arrest, has the right to be brought before a justice without unreasonable delay. As a general rule, that person should be brought before a justice within 24 hours; however, where a justice is not available within 24 hours, the accused must be taken before a justice "as soon as possible". Unfortunately, individuals who are arrested on a Friday or Saturday frequently have to wait until Monday before they are brought to court. As a result, Monday bail court dockets are often overcrowded and not all matters are reached.

Several court locations in Ontario have experimented with a variety of initiatives aimed at ensuring that all detained persons receive speedy bail hearings. Night bail courts, weekend bail courts, and video bail courts have been some of the measures which have been either discussed or tried, with varying results. We recognize that there is no single solution to this problem. Each court location must, through a process of experimentation and consultation, arrive at its own effective means of ensuring that all detained persons are brought before a justice for a bail hearing as soon as possible.

2.3 The Criminal Justice Review Committee recommends that the proposed local criminal justice co-ordinating committees review the operation of local bail courts and implement whatever measures are required to expedite the appearance of all detained persons for a bail hearing as soon as possible.

A problem requiring immediate attention is that approximately one third of all detained persons seeking pre-trial release appear three or more times in bail court before a ruling is made. Anecdotal evidence suggests this is largely a function of overcrowded court dockets. We believe that additional resources are urgently needed to address this problem.

2.4 The Criminal Justice Review Committee recommends that the Ontario Ministry of the Attorney General and the Chief Judge of the Ontario Court (Provincial Division) consider establishing additional bail courts in busy jurisdictions.

In its 1995 report, the Cole / Gittens Commission noted that most accused persons do not have much, if any, opportunity to consult with counsel prior to their arrival at the courthouse. As a result, many prisoners are unprepared for their first appearance in bail court and an adjournment must be sought. If an accused is held in custody until a subsequent court appearance, the result is a deprivation of liberty and unnecessary cost to the court system:

> Custodial remands due to lack of preparation are clearly undesirable because they significantly disrupt the life of accused persons. They are also extremely expensive for the justice system. Resources are wasted to incarcerate the accused and transport them between court and prison, and rescheduled bail hearings consume precious court time. Clearly, it would be better all around to minimize the number of bail hearings that are adjourned essentially because the accused is unprepared.[16]

At present, the vast majority of accused persons are represented by duty counsel at their bail hearings. Due to the large number of unrepresented accused, it is frequently impossible for duty counsel to conduct a thorough interview of each accused (let alone contact sureties or potential witnesses) between the time of the prisoners' arrival at the courthouse and the commencement of proceedings in bail court.

Accordingly, the Criminal Justice Review Committee recommends that:

2.5 Duty counsel continue to assist unrepresented accused at bail hearings.

2.6 In busy court locations, in accordance with the recommendations of the *Cole / Gittens Commission Report*, articling students or non-lawyers should be available to assist duty counsel to prepare for bail hearings. These "bail interview officers" could perform such tasks as: determining which accused wish to be represented by duty counsel at the bail hearing; conducting a preliminary interview of the accused, possibly at the jail or police station; and contacting potential sureties. The role of non-lawyers should, however, be limited to the provision of clerical and administrative support. Bail interview officers must not offer legal advice or opinions.

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[16] *Cole / Gittens Commission, supra* at 154.

In addition, the Committee recommends that:

2.7 At least two duty counsel be assigned to each bail court in busy court locations.

The Coroner's jury inquiring into the deaths of Arlene May and Randy Joseph Iles recently made a series of recommendations aimed at improving the quality of bail decision-making in the context of domestic violence cases. One of the factors identified by the jury as contributing to poor decision-making on bail applications was the lack of preparation time for Crown counsel. This sentiment was echoed in a number of submissions we received. Not only does lack of preparation time for Crown counsel impair the quality of justice, but it also affects the efficiency of the justice system. At present, bail court dockets in a number of jurisdictions are so overcrowded that Crown counsel do not have time to speak with defence or duty counsel before court commences. Accordingly, a number of matters which could be resolved by way of consent release must instead be litigated, thus contributing to backlogs and delay.

In addition, we are of the view that, whenever possible, Crown counsel should be assigned to bail court for intervals of at least one full week's duration. Not only would this ensure that a consistent position is advanced by the Crown, but it would also enhance the efficiency of bail court operations because Crown counsel already acquainted with ongoing matters would be able to proceed without delay.

Accordingly, the Criminal Justice Review Committee recommends that:

2.8 At least two Crown counsel be assigned to each bail court in busy court locations. One Crown could call the list while the other meets with defence counsel, complainants / victims, or police in an adjacent area. Where feasible, Crown counsel should be available to meet with defence counsel prior to the commencement of bail court.

2.9 Whenever possible, Crown counsel should be assigned to bail court for intervals of at least one full week's duration.

2.10 Adequate court staff be assigned to busy bail courts to ensure that efficient and streamlined case processing occurs.

Similarly, the efficiency of bail court operations may be improved through the introduction of simple changes to prisoner transport and bail court procedures. These could be discussed by the proposed local criminal justice co-ordinating committees[17]. For example, detention centres could be encouraged to ensure that prisoners whose matters were not reached on their first appearance in bail court are amongst the first group of prisoners transported back to court the following day.

2.11 The Criminal Justice Review Committee recommends that the proposed local criminal justice co-ordinating committees meet regularly to discuss prisoner transportation and bail court problems and procedures.

During the course of a bail hearing, a number of forms and documents must be prepared and filed with the court. At present, much of this paperwork is prepared by hand or on typewriters by court clerks. The same information must often be repeated on several forms. Not only is this process time-consuming and inefficient, but it also increases the chance of error. We are of the view that both the speed with which bail court orders are prepared, and the quality of the orders, could be improved if court clerks were given computers equipped with a suitable word processing program and template. The template should include macros for all of the standard release conditions.[18] By providing court staff with the ability to instantaneously create bail orders, errors could more easily be detected and corrected before the document is endorsed.

2.12 The Criminal Justice Review Committee recommends that bail courts be provided with computers equipped with suitable word processing programs and templates to assist court staff in preparing bail orders and related documents. Court staff should be given such training in the use of this equipment as they may require.

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[17]See Recommendations 11.5 - 11.8.

[18]See generally s. 515(4), (4.1) & (4.2) of the *Criminal Code*, R.S.C. 1985, c. C-46.

4. BAIL PROGRAMS

Bail programs are community-based services that assist individuals who, because of their financial circumstances or lack of social ties, are at risk of being denied judicial interim release on the primary ground - risk of non-appearance.[19] In exchange for the accused's pre-trial release, bail program staff undertake to supervise the accused and to promote his or her compliance with the bail conditions and attendance at subsequent court dates. Bail programs have been operating in the province since 1979 and are highly regarded by the police, judiciary, and counsel.[20]

Funding for bail programs was provided by the Ontario Ministry of the Solicitor General and Correction Services until 1997, when that Ministry determined that this program area did not fall within its mandate. Consequently, funding was terminated for five of the eleven program locations. For the remaining six, funding was continued to the end of the 1997-1998 fiscal year pending an independent program review. ARA Consulting was retained in the Fall of 1997 to conduct the review.

In December of 1997, ARA submitted its final report on the bail programs. The report concluded that, "given the complexity of factors that affect bail decisions", it is impossible to obtain "unequivocal data on program impacts".[21] Accordingly, while anecdotal evidence suggests that bail programs:

- reduce the workload of duty counsel;
- contribute to more timely bail hearings;
- reduce failures to appear and breaches of bail conditions by supervision participants;

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[19] *Criminal Code, ibid.*, s. 515(10)(a).

[20] *Cole / Gittens Commission Report, supra* at 169. See also: ARA Consulting Group, *Final Report of Ontario's Bail Verification and Supervision Program, Executive Summary* (December , 1997) at iii [unpublished].

[21] *Final Report of Ontario's Bail Verification and Supervision Program, Executive Summary, ibid.* at ii.

- have a positive impact on short and, potentially, long-term recidivism rates;
- decrease the number of accused who are remanded in custody pending trial;

and are therefore cost effective, there is no quantifiable data which is capable of verifying these contentions.[22] Consequently, ARA recommended that any decision with respect to the future of the bail programs be made on the basis of philosophy, resource availability, and priorities, and not on the grounds that the program does or does not have a desired impact.[23] The Ontario Ministry of the Attorney General of Ontario subsequently agreed to continue funding the six remaining bail program locations until the end of the 1998-99 fiscal year. The future of the programs will be decided in the coming months.

While we appreciate that, given the lack of empirical data, it is not possible to prove that bail supervision programs are cost effective, we are nonetheless of the opinion that they should be continued, if not for pragmatic reasons then for philosophical ones. All accused persons have the right to be presumed innocent. Pre-trial detention can only be justified when detention is necessary in order to ensure the accused's attendance at trial, to protect the public, or to prevent the administration of justice from falling into disrepute. We believe that considerations of fairness and the public interest in reducing custodial costs justify government support for bail programs that promote the attendance of accused persons in court without requiring pre-trial incarceration.

2.13 The Criminal Justice Review Committee recommends that the government of Ontario continue to fund bail supervision or equivalent programs.

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[22] *Ibid.* at iv - v.

[23] *Ibid.* at v.

CHAPTER THREE:
CROWN CHARGE SCREENING

> *It is a fundamental principle of the administration of justice in this country that not only must there be sufficient evidence of the commission of a criminal offence by a person for a criminal prosecution to be initiated or continued, but the prosecution must also be in the public interest.*[24]

1. INTRODUCTION

In January 1994, the Ontario Ministry of the Attorney General responded to Recommendations 20 and 21 of the *Martin Committee Report* by establishing a Crown charge screening system in Ontario. The policy directive issued by the Ministry to implement this system adopts the charge screening recommendations of the *Martin Committee Report* (see Appendix C). The implementation of a Crown charge screening system has significantly improved the administration of criminal justice in Ontario. Early review of the police brief by an experienced prosecutor identifies areas requiring further police investigation or deficiencies in the evidence gathered by the police. Weak cases that once went to trial are now being screened out at an early stage in the proceedings. It is impossible, of course, for prosecutors to predict with certainty how evidence will come out in court and cases that are weak still do come to trial, but with less regularity than was the case before formal charge screening policies were adopted.

The charge screening directive of the Ontario Ministry of the Attorney General states that prosecutors are to screen all charges by applying a threshold test to determine whether there is a reasonable prospect of obtaining a conviction. If this test is met, the prosecutor should then consider whether it is in the public interest to continue the prosecution. The policy directive lists factors that may and may not be taken into consideration in determining whether it is in the public interest to

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[24]Ontario, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Toronto: Queen's Printer, 1993) at 51 (Chair: G.A. Martin).

continue or discontinue a prosecution. The prosecution policy of the Attorney General of Canada also requires federal prosecutors to consider whether there is a reasonable prospect of conviction and whether the public interest requires prosecution when deciding whether to prosecute. Both the federal and provincial policies refer to generally accepted public interest factors governing the decision to prosecute.

We have received no submissions suggesting that the threshold "reasonable prospect of conviction" and the "public interest" tests required by the Attorney General of Ontario and the Attorney General of Canada are inappropriate. To the contrary, the universal view appears to be that these are appropriate and workable tests to apply in deciding whether to continue or terminate a prosecution. They are identical or similar to standards that have been developed by prosecution services elsewhere in Canada, the Commonwealth, and the United States.

2. CHARGE SCREENING RESOURCES

Several of the submissions received by this committee suggest that appropriate and adequate professional and support resources are not always allocated to charge screening. As Ontario's policy recognizes, the community relies on Crown counsel to vigorously pursue provable charges, while protecting individuals from the serious repercussions of a criminal charge where there is no reasonable prospect of conviction. This important function should be performed by experienced prosecutors. Sufficient time must be provided to enable them to conduct a proper review.

We have been advised that Crown counsel currently receive very little by way of support staff assistance during the charge screening function. As a consequence, they frequently spend time collecting and organizing file information. In our view, it is inefficient to have work of this nature performed by lawyers. We hasten to add that the actual charge screening must always be performed by counsel. This function cannot be delegated to non-lawyers.

3.1 The Criminal Justice Review Committee recommends that Ontario Ministry of the Attorney General and the Department of Justice (Canada) allocate appropriate and sufficient professional and support

staff resources to the charge screening function so that experienced Crown counsel have the time required to conduct proper charge screening reviews.

3. CREATING AN ENVIRONMENT CONDUCIVE TO THE PROPER EXERCISE OF PROSECUTORIAL DISCRETION

The professional judgement of experienced prosecutors is a valuable public resource which should be brought to bear at every stage of criminal proceedings. If the prosecution service concludes at any point in the criminal process that there is no reasonable prospect of obtaining a conviction, the prosecution should be halted. If the prosecutor concludes on reasonable grounds that the evidence of a witness is untrue or likely untrue on a material point, it is an appropriate exercise of prosecutorial discretion not to tender the evidence.

In his report on the proceedings involving Guy Paul Morin, Commissioner Kaufman notes that the exercise of prosecutorial discretion requires great independence and security.

> Complainants, victims, police officers and the media may be vocal in expressing their anger or concern if a prosecutor chooses not to call a witness due to doubts about reliability. The decision not to call a complainant for that reason may result in a complaint to the Ministry. The decision not to call a police officer for that reason is difficult, particularly in jurisdictions where prosecutors deal with the same officers on a daily basis. .... The exercise of such discretion by a less senior prosecutor may be particularly difficult.[25]

We have been told that some Crown counsel are reluctant to screen out charges in controversial cases because of a fear that to do so will have adverse career consequences. It has also been suggested to us that some Crown counsel feel they will not be supported by their superiors if they make unpopular charge screening decisions in high profile cases. Whether these fears are valid or not, their existence

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[25]Ontario, *Report of the Commission on Proceedings Involving Guy Paul Morin, Volume 2* (Toronto: Queen's Printer, 1998) at 1141 (Chair: Hon. Fred Kaufman).

highlights the need for the Ministry of the Attorney General and the Department of Justice (Canada) to foster work environments where prosecutors feel free to fearlessly exercise discretion on a principled basis, without concern for personal or professional repercussions.

An environment conducive to the fearless and principled exercise of prosecutorial discretion is fostered by ensuring that Crown counsel have available to them experienced and respected mentors. Some Crown offices have informally struck committees to review difficult charge screening decisions. In at least one office, the review committee keeps a record of its deliberations to serve as precedents for future cases. As well as providing future guidance, this practice promotes a more uniform application of the charge screening standards and ensures similar treatment for similar cases. So does the use of dedicated charge screening units and long term charge screening assignments.

Principled decision-making is an essential aspect of the prosecutor's public function. A Crown counsel who is not prepared to make difficult decisions is shirking one of the prosecutor's most important responsibilities. Prosecutors should expect neither to be exempt from public scrutiny nor shielded from public accountability. They must expect on occasion to be called upon to explain controversial decisions. They are also entitled to expect support from their superiors if they exercise their discretion on a principled basis.

3.2 The Criminal Justice Review Committee recommends that the Ontario Ministry of the Attorney General and the Department of Justice (Canada) examine ways to foster work environments where prosecutors feel free to fearlessly exercise discretion on a principled basis, without concern for personal or professional repercussions. We endorse the recommendation of Commissioner Kaufman that the Ministry of the Attorney General take measures, including but not limited to further education and training of Crown counsel and their supervisors, to ensure strong institutional support for the exercise of such discretion.

4. THE CHARGE SCREENING FORM

As previously noted, all criminal charges in Ontario, with the exception of some privately laid informations, are screened by either provincial or federal Crown counsel to determine, amongst other things, whether there is a reasonable prospect of conviction and whether the prosecution is in the public interest. Only if both of these requirements are met will the Crown proceed with a prosecution.

It has become the practice in Ontario for the prosecutor, while conducting the charge screening review, to complete a form indicating the charges on which the Crown will be proceeding and the mode of procedure the Crown intends to elect if the offence is hybrid. In most locations, the form also records the Crown's position on sentence in the event of an early guilty plea. This form constitutes a convenient record for internal use. It is also provided to duty or private counsel. We have been told that sometimes the form is given directly to the accused.

The information on the charge screening form indicating the charges on which the Crown will be proceeding and the Crown's election assists the Ontario Legal Aid Plan in assessing legal aid applications. Unfortunately, delays in obtaining the completed charge screening form impair the ability of legal aid staff to process applications in a timely manner, thus contributing to systemic delay and inefficiency. As a result of recent changes to its fee structure, however, we are advised that in the future the Ontario Legal Aid plan will be placing less reliance on the information contained on the Crown charge screening form.

Concerns have been expressed to us about the practice of giving charge screening forms directly to accused persons. There is a danger that unrepresented accused may mistake the purpose of the form and fail to appreciate that there is no guarantee the court will accept the Crown's sentencing position. There is also a danger that an unrepresented accused may make an uninformed decision to waive his or her right to counsel, fail to recognize an available defence, or enter a plea of guilty without truly appreciating the nature and consequences of a guilty plea. Similarly, the provision of a charge screening form which includes a sentencing position directly to a represented accused raises difficult

legal and ethical issues for the Crown.[26] In our view, charge screening forms which include an indication of the Crown's position on sentence should not be given directly to accused persons.[27]

While it may not be appropriate for the Crown to communicate its tentative position on sentence directly to an accused person, it is nevertheless desirable that the accused be appraised of this information as soon as possible. It is also in the interests of the efficient operation of the criminal justice system for accused persons who are contemplating a guilty plea to have available to them the means to ascertain the Crown's position on sentence before entering their plea. Before acting on this information, the accused should be able to obtain legal advice on the consequences of entering a guilty plea. Consequently, we believe that duty counsel should be available to obtain a copy of the charge screening form from the Crown and to provide basic legal advice to unrepresented accused.

3.3 The Criminal Justice Review Committee recommends that an adequate number of duty counsel be available to assist unrepresented accused in ascertaining the Crown's tentative position on sentence and to provide basic legal advice on the consequences of entering a guilty plea to unrepresented accused.

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[26]See Law Society of Upper Canada, *Professional Conduct Handbook, 1998 Edition*, r. 10 comm. 14 (Toronto: Law Society of Upper Canada, 1997). See also *R.* v. *Burlingham*, [1995] 2 S.C.R. 206 at 230; (1995), 97 C.C.C. (3d) 385 at 399 - 400; (1995), 38 C.R. (4th) 265 at 282.

[27]Some members of the committee feel the charge screening stage is too early in the process for the Crown to take a position on sentence and the charge screening form should not indicate a Crown sentencing position.

CHAPTER FOUR:
LEGAL AID

> *...[T]he proper functioning of the adversary system of justice, in which the nation as a whole has an important stake, demands that the defence of accused persons proceed at a level of zeal and effectiveness equivalent to that manifested in their prosecution...A system of adequate representation, therefore, should be structured and financed in a manner reflecting its public importance.*[28]

1. INTRODUCTION

Prior to 1951, legal aid services in Ontario were provided by lawyers on a voluntary basis for little, if any, remuneration. In 1951, the legislature of Ontario enacted the first legal aid statute, the *Law Society Amendment Act, 1951*.[29] Pursuant to that Act, defence lawyers could be reimbursed for any disbursements made in relation to a legal aid account, but could not bill the plan for their services.[30]

In 1965, the Joint Committee on Legal Aid recommended that the Law Society administer a formal legal aid program based upon a judicare model.[31] As a result, the Ontario Legal Aid Plan was established in 1967. Since the Plan's establishment, there has been, until recently, an exponential growth in both the number of certificates issued and the total operational costs of the Plan. Between 1985 and 1993, for example, the number of certificates awarded increased by more than 250 percent and legal aid spending doubled.[32] $230 million is now spent annually on legal aid in Ontario.

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[28]United States, *Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice* (Washington: GPO, 1963) at 48 - 49.

[29]S.O. 1951, c. 45.

[30]A. Young, "Legal Aid and Criminal Justice in Ontario" in *A Blueprint for Publicly Funded Legal Services, Volume II* (Toronto: Queen's Printer, 1997) 629 at 639 (Chair: J.D. McCamus).

[31]Ontario, *Report of the Joint Committee on Legal Aid* (Toronto: Queen's Printer, 1965) (Chair: W.B. Common).

[32]A. Young, "Legal Aid and Criminal Justice in Ontario", *supra* at 640.

In 1993, following the announcement by the Ontario Legal Aid Plan that it had surpassed its allocated budget by $39 million, the provincial government indicated it was no longer prepared to cover the Plan's deficit.[33] After negotiations, the Law Society and the Ontario government entered into a Memorandum of Understanding whereby the government agreed to cover the Plan's shortfall. In return, the Law Society agreed to a fixed budget for legal aid at reduced levels.[34]

Since cutbacks to the Ontario Legal Aid Plan were introduced by the Law Society, there has been a significant increase in the number of unrepresented accused appearing before the province's courts.[35] Large numbers of unrepresented accused impair the ability of the courts to operate efficiently and, more importantly, to ensure that justice is done. Unrepresented accused may, for example, plead guilty despite the fact that they have a viable defence, because they are intimidated by the judicial process. Similarly, most unrepresented accused are not able to identify substantive legal or technical defences, critically evaluate disclosure, or effectively cross-examine witnesses. Unrepresented accused may also decide to proceed with a trial when their interests would be better served by entering a guilty plea.

A review of the Ontario Legal Aid Plan was recently completed by a committee chaired by Professor John McCamus.[36] Building on recommendations contained in the *McCamus Committee Report* and following extensive consultations with the public, community groups, consumers of legal aid, legal aid clinics and the legal community, the Attorney General introduced the *Legal Aid Services Act, 1998*, to the provincial legislature in October, 1998. This legislation will establish the mandate, governance structure, accountability, services and funding for a new organization to be known as Legal Aid Ontario. This organization will be independent of government and be responsible for finding ways to better deliver legal aid services.

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[33] *Ibid.*

[34] *Ibid.*

[35] *Ibid.* at 642.

[36] Ontario, a Blueprint for Publicly Funded Legal Services (Toronto: Queen's Printer, 1997) (Chair: J. D. McCamus) [hereinafter the *McCamus Committee Report*]

The proposed legislation will provide Legal Aid Ontario with a stable, guaranteed budget for the first three years of the organization's operations. Provincial funding will be set at the current level. Legal Aid Ontario is to be led by an expert board of 11 directors from across the province chosen from the public, consumers of legal aid, business and the legal community. Board members will have management and financial expertise, as well as experience and knowledge of Ontario's legal aid service, law and the justice system. The mandate of the board will be to ensure that Ontario's system of legal aid efficiently provides high quality and cost effective legal services to meet the needs of those who require legal aid.

In light of the fact that a comprehensive study of the Ontario Legal Aid Plan has just been completed and legislation to reform the legal aid system in Ontario is before the legislature, the focus of this committee's recommendations will be on practical improvements which, if implemented, should expedite the processing of legal aid applications, reduce the number of unrealistic applications, and enhance the ability of duty counsel to assist unrepresented accused.

2. THE APPLICATION AND APPROVAL PROCESS

In order for the criminal justice system to function more efficiently, it is imperative that the number of unproductive court appearances be reduced. If this is to be achieved, the legal aid application and approval process must be improved. More often than not, delays in the processing of legal aid applications are the result of:

- delays in obtaining a copy of the Crown charge screening form;
- the accused person's failure to submit a complete application to the Ontario Legal Aid Plan within a reasonable time following the laying of charges; and / or
- the inability of Legal Aid staff to process the large volumes of applications which they receive.

A. Failure to Make a Timely and Complete Application

At present, it is not uncommon for cases to be adjourned several times for reasons related to legal aid. In our opinion, accused persons should be encouraged to begin the legal aid application process prior to the date of their first court appearance.[37] To this end, the police should provide to all accused persons, at the time of arrest or the issuing of an appearance notice, summons, or other form of police issued release, a brochure prepared by the Ontario Legal Aid Plan, which:

- explains the legal aid application process;
- includes a list of the documents which the Ontario Legal Aid Plan typically requires;
- contains information on the lawyer referral system operated by the Law Society of Upper Canada, as well as a list of any student or community legal clinics operating in the area where the reader might obtain advice regarding a criminal matter; and
- indicates that if the accused wishes to apply for legal aid or retain private counsel, this should be done as soon as possible and, in the absence of exceptional circumstances, should be done no later than three weeks after the date upon which charges were laid.

The brochure should also:

- advise the accused that he or she has the right to ascertain through counsel the Crown's position on sentence in the event of an early guilty plea and explain how the accused can obtain this information (*i.e.* through a privately retained lawyer or duty counsel[38]);
- explain how, where, and when the accused can obtain disclosure; and
- include anticipated time lines for dealing with the matter,[39] thereby strengthening the court's hand in enforcing those time lines.

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[37] For the purposes of this report, the term "first appearance" will be used to refer, in the case of an out of custody accused, to the date of the accused's actual first appearance in court. In the case of an accused who has been remanded in custody, it refers to the first court appearance following the completion of the bail hearing.

[38] See Recommendation 3.3.

[39] As discussed in Chapter Eight of this Report.

Brochures should be available in a variety of languages. In Appendix E, we have reproduced a brochure that is being successfully used in northern Ontario. The Ontario Ministry of the Attorney General may also wish to consider commissioning a private sector company to prepare a video tape explaining the legal aid and court process. The tape could be used to explain the justice system to individuals who may have difficulty reading and could be played at regular intervals in designated facilities within the courthouse.

4.1 The Criminal Justice Review Committee recommends that the police provide to all accused persons, at the time of arrest or the issuing of an appearance notice, summons, or other form of statutory release, a brochure, prepared by the Ontario Legal Aid Plan, which:

- **provides an overview of the criminal justice process, including information regarding the availability and role of duty counsel;**
- **explains the legal aid application process;**
- **includes a list of the documents which the Ontario Legal Aid Plan typically requires.**
- **contains information on the lawyer referral system operated by the Law Society of Upper Canada, as well as a list of any student or community legal clinics operating in the area where the reader might obtain advice regarding a criminal matter;**
- **indicates that if the accused wishes to apply for legal aid or retain private counsel, this should be done as soon as possible and, in the absence of exceptional circumstances, within three weeks of the date upon which charges were laid;**
- **advises the accused that he or she has the right to ascertain the Crown's position on sentence in the event of an early guilty plea and explains how the accused can obtain this information (*i.e.* through a privately retained lawyer or duty counsel);**
- **explains how, where, and when the accused can obtain disclosure; and**
- **includes anticipated time lines for dealing with the matter.**

B. Reducing the Number of Pointless Applications

At present, anyone who wishes to apply for legal aid coverage may do so regardless of the likelihood of success. While intake officers attempt to dissuade applicants with little or no chance of success from applying, they are not always successful. Not surprisingly, the number of applications made to the Ontario Legal Aid Plan is high. Between April 1997 and March 1998, the Plan received more than one hundred and eleven thousand applications. Nearly thirty thousand of those applicants (25%) were refused coverage.[40]

i. Self-Test

In addition to setting out information regarding how and where to apply for legal aid, the proposed brochure prepared by the Ontario Legal Aid Plan could include a "self-test" which will assist the reader in evaluating his or her chances of receiving legal aid funding. By including the self test, it is hoped that individuals who stand little or no chance of obtaining legal aid will be discouraged from applying, and will instead immediately endeavour to retain private counsel. This should, in turn, lead to faster legal aid application processing times (due to the reduced number of applications) and fewer adjournment requests.

ii. Summary Refusals

In many cases, it is obvious to all who are familiar with the court system and the workings of the Ontario Legal Aid Plan that an accused will not qualify for legal aid because of his or her financial circumstances or the absence of a risk of incarceration. Accordingly, we are of the view that trained intake officers, including duty counsel, should be empowered to provide summary refusals in the most straightforward cases. By empowering intake officers to make summary refusals, accused persons would receive immediate notice of the fact that they will not be receiving legal aid, thus reducing the number of appearances where an accused indicates to the court that he or she is awaiting a decision from the Ontario Legal Aid Plan, or has yet to provide needed information. This would also reduce the total number of applications which must be processed, thereby increasing the efficiency of the approval process.

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[40] *Ontario Legal Aid Plan Financial Reports* (March 1998) at 24 [unpublished].

The Ontario Legal Aid Plan recently asked duty counsel to interview applicants with respect to a financial eligibility criterion which was being proposed in order to regulate access to duty counsel services. This interview is more complex than a mere assessment of the risk of incarceration (the primary criterion for determining legal aid eligibility at present), and yet the interview takes only two to three minutes. It is therefore probable that the proposed eligibility determination could be managed within existing, or moderately enhanced, duty counsel resources.

4.2 If the efficiency of the legal aid approval process is to be improved, more must be done to discourage unrealistic applications. To this end, the Criminal Justice Review Committee recommends that the Ontario Legal Aid Plan consider:

- **including a "self-test" in the proposed brochures which are to be prepared by the Ontario Legal Aid Plan and provided to all accused persons; and**
- **empowering intake officers to provide summary refusals where, because of the accused's financial circumstances, the nature of the offence and / or the accused's criminal record, there is no risk of incarceration and there are no other "exceptional circumstances" which would justify extending coverage to the accused.**

3. EXCEPTIONAL COVERAGE

Legal aid certificates are currently issued only where there is both a risk of incarceration and financial eligibility is established. We recognize, however, that in some cases the consequences of a criminal conviction may be so severe that, notwithstanding the fact that there is no risk of incarceration, the accused should receive coverage. The legal aid system should have sufficient flexibility to permit exceptional coverage where the interests of justice demand that the accused receive coverage.

4.3 The Criminal Justice Review Committee recommends that the Ontario Legal Aid Plan be empowered to issue discretionary certificates in situations where, notwithstanding the fact that there is little or no risk of incarceration, the consequences of a criminal conviction on the accused would likely be so severe that, in the interests of justice, coverage should be provided.

4. THE ROLE OF DUTY COUNSEL

Duty counsel play an integral role in ensuring the efficient functioning of the province's criminal courts at the pre-trial stage. At present, the responsibilities of duty counsel include providing accused persons with advice upon arrest, assisting defendants during bail proceedings and first appearance court, and representing defendants in resolution discussions with the Crown. As both the Martin and McCamus Committees noted, the "importance of the early stages of the criminal process cannot be overstated."[41] It is during the pre-trial stage that plea negotiations are conducted, cases which do not warrant prosecution are identified and eliminated, alternative measures are considered, and the critical decision as to whether the accused will be remanded in custody pending trial is made.

If the integrity of the criminal justice process is to be maintained, it is imperative that unrepresented accused have access to knowledgeable duty counsel (the Ontario Criminal Lawyers' Association takes the position that this should occur only when the accused is financially eligible to receive legal aid). Unfortunately, due to the increased numbers of unrepresented accused, duty counsel are finding it more and more difficult to provide their clients with the desired level of service.

> Duty counsel lawyers have reported a large increase in their case load, a growth in complexity of the matters that they are now covering, and the concerns they have about the inadequate attention they are able to provide to clients under very rushed circumstances. As well, duty counsel are having to respond to the increase in time now spent doing non-legal work such as calling sureties and setting up diversion arrangements, without the availability of sufficient additional resources.[42]

Accordingly, it is the recommendation of the Criminal Justice Review Committee that:

4.4 An adequate number of duty counsel be available in each court location to assist accused persons during the crucial pre-trial stages of the criminal justice process.

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[41] Ontario, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Toronto: Queen's Printer, 1993) at 11(Chair: G.A. Martin).

[42] *McCamus Report, Volume I, supra* at 148.

4.5 All accused persons who have not retained private counsel should be permitted to consult with duty counsel during bail and set date or intake court proceedings, regardless of the accused's financial circumstances.

4.6 Duty counsel services should be provided by lawyers experienced and knowledgeable in the criminal law.

5. CONTINUITY OF DUTY COUNSEL

Pre-trial appearances are often dealt with in high volume courtrooms. Under the current system, duty counsel often have difficulty conducting a thorough interview with each accused, reviewing disclosure, interviewing other potential witnesses, and researching legal issues within the time provided. Services often consist of summary advice and representation only, with no assurance and, in many court locations, little likelihood that the accused will encounter the same duty counsel on more than one appearance.

Lack of duty counsel continuity also poses problems for the court and the Crown, since duty counsel who initially meet the accused may have comprehensive information and insight into the circumstances of the offender and the offence. For example, in a bail hearing situation involving an allegation of domestic assault, the first duty counsel may have spoken to the accused, complainant, and potential sureties in order to gauge the situation. This valuable information can be lost if a different duty counsel is present the next day. Matters such as bail hearings are often remanded, and this lack of information may have serious consequences.

The proper and efficient operation of the criminal justice system at the important pre-trial stage requires some continuity of duty counsel. Failure to provide continuity not only results in duplication of effort as the second duty counsel seeks to familiarize him or herself with the case from notes taken by someone else, but it may also result in injustice to the accused and unnecessary delay.

4.7 The Criminal Justice Review Committee recommends that efforts be made to ensure continuity of duty counsel in each court location. In court locations where bail hearings and set date proceedings are

conducted daily, this may be accomplished by assigning the same duty counsel to bail / set date court for a period of one full week or longer. In other areas where, for example, set date court is held every Monday, this may be accomplished by scheduling duty counsel for four consecutive Mondays or all Mondays in the month of July, etc.

6. CASE MANAGEMENT

In recent years, the Ontario Legal Aid Plan has required all cases with anticipated billings in excess of $25,000 to be case managed (in the near future this threshold may be reduced to $10,000). Before a certificate is issued, legal aid staff meet with defence counsel and draft a budget for the various stages of the proceedings. Adherence to the budget is monitored by legal aid staff as the case progresses through the system. Unplanned expenditures, such as the cost of bringing an application for *certiorari* or a bail review, require the Plan's approval.

In order to ensure that legal aid resources are fairly allocated amongst accused persons, it is imperative that the Ontario Legal Aid Plan take steps to ensure that legal aid resources are properly managed by counsel. Accordingly, we endorse Legal Aid's use of case management and support its extension to preliminary inquiries and cases involving smaller projected billings. In addition, we are of the view that case management should be extended to cases involving multiple accused and multiple counsel. Pretrial case management may also be an effective means of ensuring that only competent counsel, with an appropriate amount of experience, are awarded certificates for complex cases.

4.8 The Criminal Justice Review Committee endorses the use of case management by the Ontario Legal Aid Plan and supports its extension to preliminary inquiries, cases involving smaller projected billings, and cases involving multiple accused.

7. LIMITED USE CERTIFICATES

At present, legal aid certificates are issued on an "all or nothing" basis – a defendant either receives a certificate which will allow him or her to retain a lawyer to assist throughout the pre-trial, trial, and

sentencing stages, or the defendant receives no certificate at all. In our opinion, the Ontario Legal Aid Plan should study the feasibility of issuing task-specific certificates. An accused person could be offered, for example, a certificate which would allow him or her to retain counsel for the sole purpose of:

- engaging in plea negotiations with the Crown;
- filing a motion or application;
- researching and arguing a point of law at trial; and
- making submissions on sentence if the accused is convicted.

The use of task-specific certificates would allow the Ontario Legal Aid Plan to provide more accused persons with some assistance from counsel.

4.9 The Criminal Justice Review Committee recommends that the Ontario Legal Aid Plan study the feasibility of issuing task-specific certificates.

CHAPTER FIVE:
CROWN DISCLOSURE

The preparation, delivery and storage of Crown Briefs has created problems for the Police and Crowns, and consequently for the Defence and the Courts. A large part of the Brief which was formerly provided to the Crown as a typed "will say" or "anticipated evidence" statement is now provided to the Crown in the form of audio or video tapes. This procedure...has made it much more difficult and costly for the Crown to make disclosure and to adequately prepare and prosecute cases.[43]

1. INTRODUCTION

As a result of the decisions of the Supreme Court of Canada in *R.* v. *Stinchcombe*[44] and subsequent cases,[45] it is now clearly established that the Crown has a legal and constitutional obligation to provide full and timely disclosure to the defence in criminal proceedings. Following the release of the *Stinchcombe* decision, the Martin Committee was formed to inquire into and make recommendations on disclosure practices in Ontario. In its 1993 report, the Martin Committee recognized that Crown disclosure is not only a crucial component of an accused's right to make full answer and defence, it is also vital to the efficient functioning of the criminal justice system.

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[43]Submission of David Boothby, Chief of the Metropolitan Toronto Police, dated 14 April 1998 at 3.

[44][1991] 3 S.C.R. 326; (1992), 68 C.C.C. (3d) 1; (1992), 8 C.R. (4th) 277.

[45]The Crown must disclose all information pertaining to a charge, whether inculpatory or exculpatory, under its control, unless the information is clearly irrelevant or subject to some privilege which justifies the refusal to provide that information to the defence. Information is relevant for the purposes of the Crown's disclosure obligation if there is a reasonable possibility that withholding the information will impair the defendant's right to make full answer and defence guaranteed by s. 7 of the *Charter of Rights and Freedoms*. See: *R. v. Stinchcombe, ibid.,* at 335 - 346 (S.C.R.); 9 - 16 (C.C.C.); 285-292 (C.R.); *R. v. Egger,* [1993] 2 S.C.R. 451 at 466 - 467; (1993), 82 C.C.C. (3d) 193 at 203-204; (1993), 21 C.R. (4th) 186 at 196 - 197; *R. v. Chaplin,* [1995] 1 S.C.R. 727 at 739 - 741; (1995), 96 C.C.C. (3d) 225 at 233 - 234; (1995), 36 C.R. (4th) 201 at 209 - 210; and *R. v. Dixon,* [1998] 1 S.C.R. 244 at 260 - 262; (1998), 122 C.C.C. (3d) 1 at 14 - 16; *sub nom R.* v. *McQuaid* (1998), 13 C.R. (5th) 217 at 228 - 229.

> [F]ull disclosure has a beneficial influence on the administration of justice as a whole. Complete disclosure may lead to shorter trials and waived or shorter preliminary inquiries, it may prevent the unnecessary attendance of witnesses, and may facilitate resolution discussions, the withdrawal of charges, and, where appropriate, pleas of guilty.[46]

Following the release of the *Martin Committee Report*, the Attorney General issued a new directive on disclosure, based on the principles and recommendations outlined in the report.[47] While this new directive and judicial decisions interpreting the Crown's disclosure obligation have settled most of the outstanding legal issues concerning the required content of Crown disclosure, numerous implementation and logistical problems remain unresolved. As a result, there continue to be cases in Ontario where issues relating to Crown disclosure significantly delay the commencement of trial proceedings or result in adjournments, stays of proceedings, or mistrials. The Martin Committee's objective of establishing uniform and efficient disclosure practices across the province has not been fully realized.

2. THE DISCLOSURE RESPONSIBILITIES OF THE POLICE

The provision of municipal and provincial policing services in Ontario is governed by the *Police Services Act*.[48] Section 42 provides that the statutory duties of a police officer include participating in prosecutions. The important role that police play in the Crown disclosure process is a concrete example of the discharge of this duty.[49] The police have a duty to disclose to Crown counsel all relevant information uncovered during the investigation of a crime, including information which assists the accused.

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[46]Ontario, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Toronto: Queen's Printer, 1993) at 143(Chair: G.A. Martin)[hereinafter *Martin Committee Report*].

[47]Ministry of the Attorney General of Ontario, *Crown Policy Manual*, Policy D-1, Disclosure (15 January 1994), (revised 15 February 1995) [unpublished].

[48]R.S.O. 1990, c. P.15.

[49]In its Declaration of Principles, the *Police Services Act, ibid.*, recognizes the importance of safeguarding the fundamental rights that are enshrined in the *Canadian Charter of Rights and Freedoms*.

This duty is reflected in s. 1(c) of the *Code of Offences* of the *Police Services Act*, which provides:

> A chief of police or other police officer commits an offence against discipline if he or she is guilty of:
>
> (1)(c) NEGLECT OF DUTY, that is to say, if he or she, ...
>
> (vii) fails to report anything that he or she knows concerning a criminal or other charge, or fails to disclose any evidence that he or she, or any person within his or her knowledge, can give for or against any prisoner or defendant.[50]

Recommendation 42 of the *Martin Committee Report* called upon the provincial Solicitor General, in cooperation with federal authorities, to issue a directive or standing order requiring all police forces operating within the province of Ontario to comply with the Attorney General's directive on disclosure in their relations with Crown prosecutors. The Committee also recommended that the directive make clear that police and other investigators are bound to exercise reasonable skill and diligence in discovering all relevant information, even though such information may be favourable to the accused.[51]

The authority of the Solicitor General to issue such a directive or standing order flows from the *Police Services Act*, which states that the powers and duties of the Solicitor General under the *Act* include:

- The development and promotion of programs to enhance professional police practices, standards, and training;
- The issuing of directives and guidelines respecting policy matters; and
- The monitoring of police forces to ensure that they comply with prescribed standards of service.[52]

Recommendation 42 of the *Martin Committee Report* has not been fully implemented. We have been advised that the Ministry of the Solicitor General is reluctant to issue a disclosure directive or

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[50] R.R.O. 1990, Reg. 927.

[51] *Martin Committee Report, supra* at 264 - 265.

[52] *Police Services Act, supra*, s. 3(2)(b), (d), (j).

guideline under the *Police Services Act* as the Ministry is of the view that directives relating to police operations are more effective if they are issued through the police chain of command. With due respect for the Ministry's position, we are nevertheless of the view that it is imperative that the duties and responsibilities of police officers with respect to disclosure be clearly articulated in a binding directive or standing order. It is the responsibility of the Ministry of the Solicitor General to ensure that "adequate and effective police services are provided at the municipal and provincial levels" and, in the view of the committee, this includes ensuring that the police fulfill their disclosure obligations.[53] While individual police officers are accountable to the internal chain of police command, police forces, whether federal or provincial, are accountable to the public through the relevant Solicitor General. The issuing of a directive or standing order concerning disclosure will help to ensure the seamless provision of disclosure in Ontario, by clearly placing the police obligation to disclose to Crown counsel on an equal footing with Crown counsel's duty to disclosure to an accused person.

We note that the Ontario Ministry of the Attorney General and the Ontario Ministry of the Solicitor General and Correctional Services recently jointly prepared and adopted a policy directive on physical scientific evidence. This directive comprehensively sets out in a single document the disclosure obligations of the police, forensic scientists, and the Crown relating to physical scientific evidence. We believe a similar directive is required concerning the general disclosure responsibilities of the police and the Crown.

The Commission on Proceedings Involving Guy Paul Morin recommended that a committee be established to examine outstanding disclosure issues and to make recommendations as to how the efficiency of the disclosure process in Ontario might be improved. We have attempted to address some of the current issues relating to disclosure in this report; however, we are also of the view that there ought to be a permanent committee, comprised of senior representatives of the judiciary, the police, the federal and provincial Crown, and the defence bar, with authority to develop a

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[53] *Ibid.*, s. 3(2)(a).

comprehensive joint police and Crown disclosure directive and to inquire into and resolve systemic problems relating to the disclosure process in Ontario.

5.1 The Criminal Justice Review Committee recognizes that full and timely Crown disclosure is an essential component of an efficient criminal justice system. To ensure that efficient disclosure practices are instituted and maintained across the province, police and prosecution co-operation and co-ordination must improve. We recommend that the Attorney General and Solicitor General of Ontario, in co-ordination with federal policing and prosecution authorities, establish a permanent disclosure co-ordinating committee to:

(a) develop a joint directive or standing order comprehensively setting out the disclosure responsibilities of the police and prosecutors, to be issued by the Solicitor General and the Attorney General of Ontario and relevant federal authorities; and

(b) examine, on an ongoing basis, disclosure issues and to make recommendations as to how these issues might best be resolved.

3. OVERVIEW OF EXISTING PROBLEMS WITH DISCLOSURE IN ONTARIO

Most of the submissions we received with respect to the disclosure process pertained to one or more of the following:

- the timing of disclosure;
- the format and content of disclosure; and
- the cost of disclosure.

In our opinion, these issues are symptomatic of a larger problem – a lack of co-ordination and co-operation between the police and Crown with respect to disclosure.

In September 1995, the Ministry of the Attorney General and the Ontario Association of Chiefs of Police (OACP) entered into a Memorandum of Understanding (MOU) with respect to disclosure. Pursuant to that agreement, the Ministry and OACP agreed to establish pilot case management units in London, Etobicoke, Hamilton, Brampton, Sault Ste. Marie, Thunder Bay and either Newmarket or Whitby. The purpose of the units was to facilitate disclosure, charge screening and resolution discussions. If the units were deemed successful, then the MOU was to be implemented province-wide. Unfortunately, the MOU has proven ineffective in resolving or avoiding disputes between the Crown and police with respect to the timing, cost and quality of disclosure. This is largely due to the fact that the MOU is not legally binding on members of the OACP and has not been fully implemented by a number of municipal police forces. In addition, the Ontario Ministry of the Attorney General has not implemented the MOU in certain court locations because of the costs involved.

We are extremely concerned about the lack of uniform and consistent disclosure practices in Ontario. We also note that there are new issues which have arisen since the original MOU, such as the proliferation of the use of audio and video tape and the issue of transcript production.

In the opinion of the Criminal Justice Review Committee:

5.2 It is urgent that a new and effective Memorandum of Understanding be negotiated between police representatives and the Ministry of the Attorney General as soon as possible. The proposed Ontario Attorney General and Solicitor General's co-ordinating committee on Crown disclosure[54] should monitor the progress of discussions between the police and the Ministry of the Attorney General and determine a reasonable time frame for the development and implementation of uniform and consistent disclosure practices in Ontario.

5.3 The proposed Ontario Attorney General and Solicitor General's co-ordinating committee on Crown disclosure should report on a regular basis to the proposed provincial criminal justice co-ordinating committee.

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[54] See Recommendation 5.1.

4. THE SUBSTANTIVE CONTENT OF THE MEMORANDUM OF UNDERSTANDING

A. The Timing of Disclosure

Early disclosure is vital to the efficient functioning of the courts and is an essential component of the caseflow management system proposed in Chapter Eight of this report. In *Stinchcombe*, the Supreme Court of Canada declined to establish any "hard and fast" rules with respect to when disclosure ought to be made.[55] Not surprisingly, there are significant variations within the province as to the timing of disclosure. In some areas, initial disclosure is routinely available at the time of the accused's first court appearance. In other areas, it takes several weeks, or even months, before disclosure can be obtained. In our opinion, it is imperative that the timing of disclosure throughout the province be standardized. Barring exceptional circumstances, disclosure should be provided to the accused at the time of his or her first court appearance.[56]

B. The Production of Additional Briefs for Disclosure to the Defence

Recommendation 43 of the *Martin Committee Report* proposed that the police bear all costs associated with the preparation and delivery of one copy of the investigative brief to the Crown, and that the Ministry of the Attorney General be responsible for the material costs associated with producing second or subsequent copies of the brief for disclosure purposes.[57] The Martin Committee declined, however, to indicate who should be responsible for physically producing additional copies of the brief for disclosure.

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[55] Although the court did indicate that, as a general rule, an accused ought not to be called upon to make an election or enter a plea until disclosure has been provided, it also recognized that the Crown has a reviewable discretion to delay disclosure in certain circumstance. See: *R. v. Stinchcombe*, supra at 339 - 343 (S.C.R.); 11 - 14 (C.C.C.); 287 - 290 (C.R.).

[56] As previously noted, the term "first appearance" refers, in the case of an out of custody accused, to the date of the accused's actual first appearance in court. In the case of an accused who has been remanded in custody, it refers to the first court appearance following the completion of the bail hearing.

[57] *Martin Committee Report, supra* at 266 - 267.

Since the release of the *Martin Committee Report* in 1993, the question of whether it is the responsibility of the police or the Crown to reproduce the brief for disclosure to the defence has been the subject of a great deal of debate. Disagreement over this issue has, at times, impaired the efficiency of the disclosure process. In our opinion, it is imperative that this issue be definitively settled. While we believe that for reasons of efficiency, the police should physically reproduce the second or subsequent copies of the brief, we do not mean to take away from what the Martin Committee indicated about who should pay for the cost of reproduction of the second or subsequent copies.

Requests for disclosure are now routinely made in virtually all cases where the accused is represented by counsel, as well as in a significant number of cases where the accused is unrepresented. In light of this, we are of the view that, barring special circumstances, it would be more convenient and economical if two copies of the disclosure material were prepared by the police at the outset: one for Crown counsel and one for the defence. In cases involving multiple accused, the police should prepare one copy of the disclosure materials for each accused. In addition to improving the speed and efficiency of the disclosure process, it is anticipated that this will result in better quality disclosure briefs as:

- the police will be careful to include only relevant materials in the brief (*i.e.* to avoid unnecessary photocopying, etc.); and
- the defence will no longer be receiving "photocopies of photocopies" but will instead be receiving photocopies which are produced directly from the original documents.

C. Police Accountability

Crown counsel throughout the province have expressed concern to us about delays in police response to requests for additional disclosure and / or investigation. In many locations, requests for additional disclosure must be made directly to the investigating officer. There is often no responsible superior officer the Crown can contact if the investigating officer fails to respond in a timely manner to the Crown's request. On the other hand, there are a number of places in the province where the Crown

disclosure process works well. The Martin Committee highlighted Essex County's lessons for the rest of the province in Appendix K to its report.[58] Inspector John Hagarty of the Stratford Police Service provided us with a presentation suggesting that the Crown disclosure process works well in Perth County because:

- police investigators take "ownership" of the Crown briefs in their cases and work hard to ensure they are completed on time;
- a police supervisor is directly responsible for maintaining Crown brief quality standards and the scheduling of a first court appearance within 3 weeks of the charge date;
- a police Inspector is directly responsible for ensuring prompt response to requests for Crown brief clarification or additional investigation;
- the police services in Perth County are committed to the principle that having a complete Crown brief available for disclosure at first appearance benefits all criminal justice stakeholders;
- full and complete first appearance disclosure is seen as an important key to Perth County's impressive early resolution rate;
- early resolutions save money for police services because they reduce police court time and increase the time that officers can spend "on the street"; and
- a good working relationship exists between the police, the Crown office, the defence bar and the local judiciary when it comes to effective and efficient case management.

We are of the view that there should be at least one police officer in each court location whose job it is to review Crown briefs before they are given to the prosecution service. These "disclosure officers" should be of high rank and should be empowered to take appropriate action where officers

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[58] In Essex County, disclosure by the Crown is accomplished by a "court services office", entitled Windsor Joint Forces Court Services, especially designed to handle disclosure and a number of other functions relevant to the early stages of the criminal process.

fail to make full and timely disclosure to the Crown or to respond to Crown requests for additional materials and / or investigation. While we endorse the concept of a senior police officer having the above described role, it is also essential that front-line officers, who have the initial and primary responsibility for assembly of the brief, continue to be accountable for their work.

D. Quality and Format of Police Briefs

Both Crown and defence counsel have expressed major concerns to us over the quality of police briefs in the province. Counsel are too frequently given a jumble of documents which are neither numbered nor indexed in any fashion. This lack of organization makes it difficult for the Crown to perform charge screening or to maintain an accurate record of which documents have and have not been disclosed.

We are of the view that it would greatly facilitate the work of both Crown and defence counsel if all police briefs were organized in a similar fashion. The Integrated Justice Project is currently working to develop an electronic police brief and Crown file. In our opinion, this presents a unique opportunity to introduce a standardized Crown brief to Ontario. Until such time as a standardized brief is developed, we recommend that uniform quality control standards be implemented across the province. At a minimum, those standards should stipulate that all police briefs must be paginated, include an index, and contain a meaningful synopsis of the case.

An effective synopsis is invaluable to both Crown and defence counsel. Not only does it provide a summary of the allegation(s) which can be used for bail, pre-trial, guilty plea, trial, and sentencing purposes, but it also allows the reader to make a quick, informed, and reliable assessment of the strength of the Crown's case.[59] A meaningful synopsis should be narrated in the third person and contain sufficient detail to clearly establish the nature of the allegations and the evidence to be relied on in proving the elements of the charge (*e.g.* identification evidence, confession). It should also contain information regarding the circumstances surrounding the charge and make clear the

[59] A sample meaningful synopsis is set out in Appendix F.

involvement of each accused. Since the synopsis will be read to the court in the event of a guilty plea, it must be in an easy-to-read, story-like format, with sufficient detail to adequately describe the offence, including aggravating factors, particularly injuries and damage.

E. Basic Disclosure Costs and the Accused

Recommendation 44 of the *Martin Committee Report* provides that "an accused person should not have to pay for basic disclosure."[60] In a simple case where no Crown brief is prepared, basic disclosure will consist of "photocopies of a few pages of documents, for example, witness statements, a synopsis, the information, an occurrence report, or an alcohol influence report and blood/alcohol certificate."[61] In a larger case, where a full and complete Crown brief is prepared, basic disclosure is simply the brief itself.[62]

In spite of the Martin Committee's recommendation, there are police forces in the province who continue to make accused persons pay for basic disclosure. In our view, this is inconsistent with the spirit of the Supreme Court of Canada's disclosure jurisprudence and, in any event, is an unacceptable practice.[63]

> **In the opinion of the Criminal Justice Review Committee, the Memorandum of Understanding between the Ontario Ministry of the Attorney General and the Ontario Association of Chiefs of Police should incorporate the following principles:**
>
> ***Timing***
>
> **5.4 In the absence of exceptional circumstances, disclosure should be provided to an accused at his or her first court appearance.**

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[60] *Martin Committee Report, supra* at 269.

[61] *Ibid.* at 272.

[62] *Ibid.*

[63] In our view it is not inappropriate for the Crown to charge a reasonable replacement fee where the defence receives a copy of disclosure free of charge but misplaces it.

Production

5.5 Two copies of the disclosure materials should be prepared by the police at the outset - one for the Crown and one for the defence. In cases involving multiple accused, the police should prepare one copy of the disclosure materials for each accused.

Accountability

5.6 Every police force in the province should be required to designate an appropriate number of disclosure officers, who will be responsible for reviewing all police briefs to determine whether the briefs: (a) are complete; and (b) comply with quality control standards.

5.7 Only briefs which are approved by a disclosure officer should be forwarded to the Crown. All other briefs should be remitted back to the investigating officer with an indication of what improvements / additional materials are required.

5.8 Disclosure officers should be of high rank and should be empowered to take appropriate action if officers fail to make full and timely disclosure to the Crown, or to respond to Crown requests for additional materials or investigative work, in a prompt and courteous manner.

Quality Control

5.9 Uniform quality control standards should be implemented across the province. At a minimum, those standards should stipulate that all police briefs must:

- **(a) be paginated;**
- **(b) include an index; and**
- **(c) contain a meaningful synopsis of the case. The synopsis should include a list of police and civilian witnesses and a summary of each witness's anticipated evidence which clearly articulates the significance of that evidence.**

Completeness

5.10 Checklists should be used to monitor the timing and content of disclosure.[64] All disclosure should be dated and the brief flagged so that the Crown is aware when additional disclosure has been added to the brief after the accused's first court appearance.[65]

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[64] A model index / checklist is set out at Appendix G of this Report.

[65] As defined in Chapter Four.

Cost

5.11 The accused is entitled without fee to basic disclosure as defined in the *Martin Committee Report.*

5.12 Each accused is entitled to one copy of basic disclosure materials. Accordingly, where an accused person requests an additional copy or copies (*e.g.* because the original materials have been lost), the accused may be charged a reasonable fee for this service.

5. AUDIO AND VIDEO RECORDINGS

There has been a significant increase in the use of video and audio recording by the police in recent years. A number of appellate decisions, as well as the *Martin Committee Report*, have pointed out the benefits that accrue to the administration of justice when the police record their statement taking procedures.[66] The decisions of the Supreme Court of Canada in *R. v. Khan*[67] and *R. v. K.G. B.*[68] have also encouraged increased video and audio taping by the police. A concern has been expressed to us that increased use of video and audio taping by the police may be contributing to a deterioration in interviewing skills. There appears to be an unfortunate tendency on the part of some police investigators to allow suspects and witnesses to discuss irrelevancies, sometimes at great length, when interviews are taped rather than manually recorded by the investigator. Police interviews intended for introduction into evidence should be focussed on legally relevant issues. Long, rambling interviews are ineffective, inefficient, and contribute to wasted trial preparation and court time.

5.13 The Criminal Justice Review Committee recommends that police basic and in-service training programs continue to stress the importance of effective and efficient witness interviews and how audio and video taping can enhance rather than hinder the statement taking process.

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[66]See *e.g., R. v. Barrett* (1993), 13 O.R. (3d) 587 at 593 - 595 and 607 - 609; 82 C.C.C. (3d) 266 at 269 - 271 and 275 - 277; 23 C.R. (4th) 49 at 57 - 60 and 71 - 73 (C.A.); reversed on another basis [1995] 1 S.C.R. 752; 96 C.C.C. (3d) 319; 38 C.R. (4th) 1. See also the *Martin Committee Report*, *supra* at 153 - 163.

[67][1990] 2 S.C.R. 531; 59 C.C.C. (3d) 92; 79 C.R. (3d) 1.

[68][1993] 1 S.C.R. 740 at 792 - 805 and 822 - 825; 79 C.C.C. (3d) 257 at 292 - 301 and 314 - 316; 19 C.R. (4th) 1 at 37 - 46 and 59 - 61.

Given the number of audio and video tapes now generated by the police, and the cost of reproducing electronic recordings, it is not surprising that the question of who should bear the cost of providing copies of audio or video tapes to the defence has proven contentious. In several locations throughout the province, defence counsel are charged for copies of videotapes. In other locations where defence counsel are not charged, disputes have arisen between the Ministry of the Attorney General and the police as to who is responsible for the costs of tape reproduction.

The current disclosure directive of the Ontario Ministry of the Attorney General, which is based upon the recommendations of the Martin Committee, provides that the defence shall be given [emphasis added]:

- *a copy of*...any original video or audio recorded statement of *the accused* to a person in authority, regardless of whether the Crown intends to introduce the recording into evidence;
- *a reasonable opportunity, in private, to view* and listen to the original or a copy of any audio or video recording of any *statements made by a potential witness other than the accused;* and
- where Crown counsel intends to introduce them into evidence, ... *copies of* ... audio or video recordings of anything other than a statement by a person.[69]

It appears that providing the defence with an opportunity to view or listen to recordings of statements of potential witnesses other than the accused is working well in some areas of the province. We have been advised, however, that in other areas, especially the larger jurisdictions, this form of disclosure has proven to be impractical. In a number of cases, the defence has successfully applied for a court order requiring the Crown to provide a copy to the defence.[70] In Brampton, the Peel Regional Police Service and the provincial Crown office have determined that it is more cost effective to prepare two

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[69]Ministry of the Attorney General for Ontario, *Crown Policy Manual*, Policy D-1, Disclosure (15 January 1994), (revised 15 February 1995) at 5 - 7.

[70]*R.* v. *Blencowe* (1997), 118 C.C.C. (3d) 529; 9 C.R. (5th) 320 (Ont. Ct. Gen. Div.).

copies of any videotapes at the outset (one for Crown counsel and one for the defence), than to produce only one copy initially and then prepare, at some later date, a second copy.

Having regard to the importance that audio and video taped evidence has assumed in the disclosure process, it is our view that the permanent disclosure co-ordinating committee we have proposed in Recommendation 5.1 should address this issue on a priority basis. The impact of the Integrated Justice Project on disclosure practices and procedures must be considered in developing a comprehensive, province-wide policy. Full participation of the police community in the development and implementation of disclosure policy is also essential.

Another issue we believe the proposed permanent disclosure co-ordinating committee should address relates to the policy in some custodial institutions of requiring the presence of defence counsel when an in-custody accused uses facilities in the institution to play audio or video disclosure provided by the Crown. This requirement is time consuming and costly. There may, however, be concerns of which we are unaware that justify the policy.

5.14 The Criminal Justice Review Committee recommends that the proposed disclosure co-ordinating committee develop, on a priority basis, a comprehensive, province-wide policy on the disclosure of audio and video taped evidence for consideration and implementation by the proposed provincial criminal justice co-ordinating committee.

6. TRANSCRIPTS

Increased reliance on video and audio taped statements has created difficulties for prosecutors and, consequently, for the defence and courts. In particular, concerns have been expressed to us about the utility of recorded statements which are not accompanied by transcripts. Not only is it extremely tedious and time-consuming for defence and Crown counsel to review large numbers of audio / video taped statements, but it is also difficult to make use of an audio / video tape during cross-

examination.[71] Precious court time is frequently wasted as counsel fast-forward and rewind tapes in search of the relevant portion of a statement. The advantages of accompanying video taped evidence with a transcript are apparent. Triers of fact are better able to follow what is said on a tape recording with the benefit of a transcript. Transcripts facilitate accuracy and avoid confusion.[72]

We recognize that transcripts are expensive to produce and that the cost of producing transcripts in every case involving a recorded statement would be prohibitive. However, at the present time, the question of whether the Crown will be required to produce a transcript of a recorded statement, or portions thereof, is sometimes not resolved until trial. This is too late. Trial delays occasioned by last minute judicial orders requiring the Crown to prepare transcripts must be avoided. In the absence of a comprehensive, province-wide policy, this issue should be resolved by agreement between counsel or, at the latest, at a judicial pre-trial conference. If the issue cannot be resolved by way of agreement, a judicial ruling should be sought well in advance of the date set for trial.

The Criminal Justice Review Committee recommends that:

5.15 In the absence of a comprehensive, province-wide policy on the transcription of witness statements, the issue of whether the Crown will be required to produce a transcript of a recorded statement, or portions thereof, should be resolved, if possible, by agreement between counsel prior to or at the judicial pre-trial conference sought well in advance of the trial date.

5.16 The proposed permanent disclosure co-ordinating committee should develop a comprehensive, province-wide policy on the transcription of witness statements for consideration by the proposed provincial criminal justice co-ordinating committee.

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[71] U.K., "Report of the Royal Commission on Criminal Procedure" Cmnd 8092 in *Sessional Papers* (1981) Volume 1, para 4.22 (Chair: Sir Cyrill Phillips).

[72] *R.* v. *Sherratt* , June 23, 1998, unreported decision of Hill J., Ontario Court (General Division).

CHAPTER SIX:
RESOLUTION DISCUSSIONS

The Committee is of the opinion that resolution discussions are an essential part of the criminal justice system in Ontario and, when properly conducted, benefit not only the accused, but also victims, counsel and the administration of justice generally.[73]

1. INTRODUCTION

The term "resolution discussions" refers to the process "whereby competent and informed counsel discuss the evidence and likely outcome of a criminal prosecution with a view to achieving a disposition which will result in the reasonable advancement of the administration of justice."[74] Resolution discussions encompass "much more than simply plea negotiations...[r]esolution discussions include any discussions between counsel aimed at resolving any issues that a criminal prosecution raises."[75]

Resolution discussions are often referred to as "plea bargaining".[76] As the Supreme Court of Victoria, Australia, has observed, this term is "an ambiguous expression which is better avoided. It is a misnomer of most situations it is used to cover."[77] While the term is unfortunate, it is probably too late to seek to excise it from the vocabulary of public discourse on criminal justice issues. The pejorative connotations which are often associated with the term "plea bargain" serve as a useful

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[73]Ontario, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions* (Toronto: Queen's Printer, 1993) at 281 (Chair: G.A. Martin)[*hereinafter Martin Committee Report*].

[74]D.W. Perras, "Plea Negotiations" (1979-1980), 22 Crim. L.Q. 58 at 58 - 59.

[75]*Martin Committee Report, supra* at 282.

[76]There is an unfortunate tendency for the media and public to confuse the outcome of Crown charge screening with plea bargaining. As a result, the Crown is sometimes publicly criticized for plea bargaining when, in fact, the prosecution accepted a guilty plea to a lesser charge not as a result of negotiations with the defence but because, in the final analysis, the evidence did not support the more serious charge originally laid by the police.

[77]*R. v. Marshall,* [1981] 1 V.R. 725 at 732 (S.C.).

reminder that resolution agreements which are perceived to result in unacceptably low sentences tend to undermine public confidence in resolution discussions generally.[78]

The *Martin Committee Report* described resolution discussions as an "essential part of the criminal justice system" which, "when properly conducted, benefit not only the accused, but also victims, witnesses, counsel, and the administration of justice generally."[79] In addition to improving the efficiency of the criminal courts by reducing the number of charges which must be tried and / or the number of witnesses which must be called, negotiated guilty pleas may also spare both witnesses and the accused the ordeal and inconvenience of a trial, lead to a reduced sentence for the accused, and result in cost savings for the accused, the administration of justice and, therefore, the general public.[80]

Some of the submissions which we received suggest that the subject of resolution discussions continues to foster debate in many circles. There can be no doubt that if resolution discussions are conducted improperly they may have the effect of undermining community confidence in the administration of criminal justice. However, neither our experience nor the submissions we received suggest that resolution discussions are being conducted improperly in Ontario.

2. THE UNREPRESENTED ACCUSED

Following the release of the *Martin Committee Report* in 1993, both the Ontario Ministry of the Attorney General of Ontario and the Department of Justice (Canada) issued revised policy directives on resolution discussions which incorporated most of the major recommendations of the *Martin*

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[78] See S.A. Cohen and A.N. Doob, "Public Attitudes to Plea Bargaining" (1989-90) 32 Crim. L.Q. 85 at 97 and 102-103.

[79] *Martin Committee Report, supra* at 281.

[80] *Ibid.* at 287-290.

Committee Report.[81] The adoption of federal and provincial Crown policies governing resolution discussions has resulted in greater consistency in Crown practices across the province.

One major difference between the federal and provincial Crown policies is that the federal policy provides guidelines governing the conduct of resolution discussions between Crown counsel and unrepresented accused, whereas the provincial policy does not. Having regard to the significant number of accused persons who appear without legal representation in Ontario criminal courts, it is our view that the provincial policy should be expanded to include explicit direction and guidance to prosecutors with respect to this difficult issue.

The "Plea and Sentence Negotiations" chapter of the *Prosecution Policy of the Attorney General of Canada* states:

> Plea or sentence negotiations with an unrepresented accused call for extreme care. In general, Crown counsel should not initiate negotiations with an unrepresented accused; if approached by an accused, however, counsel may negotiate in accordance with this policy.
>
> Crown counsel should first encourage the accused to retain counsel and, where appropriate, advise the accused of the availability of legal aid. If the accused declines to retain counsel, Crown counsel should generally arrange for a third person to be present during negotiations because of the need to maintain an arms-length relationship with the accused. A detailed record should be kept of all discussions. In most instances, a written agreement or written evidence of an agreement[82] will be appropriate. When the case is disposed of in accordance with a negotiated plea or sentence agreement, Crown counsel should tell the judge about the existence of the agreement and that the accused was encouraged to retain counsel but declined to do so.
>
> Crown counsel should not conduct plea or sentence negotiations with an unrepresented accused unless satisfied that the accused has been given full disclosure or is aware of the right to disclosure.[83]

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[81] See Appendices H & I.

[82] *E.g.*, a memorandum to file or, at a minimum, a detailed endorsement on the file.

[83] Department of Justice (Canada), *Prosecution Policy of the Attorney General of Canada*, "Plea and Sentence Negotiations" (Jan. 1993)] at II-6-5 to II-6-6.

In our view, this is a helpful statement of the principles that should guide prosecutors in conducting resolution discussions with unrepresented accused. We recommend that Ontario's policy manual contain similar guidelines.

6.1 The Criminal Justice Review Committee recommends that Policy R-1 of the provincial *Crown Policy Manual* be amended to include guidelines, similar to those contained in the plea and sentence negotiation chapter of the federal prosecutor's manual, governing the conduct of resolution discussions with unrepresented accused.

3. THE PLEA COMPREHENSION INQUIRY

Recommendation 55 of the *Martin Committee Report* suggests that where a plea of guilty is entered, the trial judge should question the accused to ensure that:

- the accused appreciates the nature and consequence of a plea of guilty;
- the plea is made voluntarily; and
- the accused understands that an agreement between the Crown prosecutor and defence counsel does not bind the court.

Amendments to the *Criminal Code* to incorporate the plea comprehension inquiry recommendations of the Martin Committee have been discussed at the federal, provincial, and territorial level. We are also aware that many judges in Ontario routinely conduct a succinct, plain language inquiry in open court as to the accused person's comprehension of the proposed plea of guilty. Plea comprehension inquiries are not, however, performed in all cases. In some cases, successfully conducting them can pose a significant judicial challenge. None the less, it is crucial in our opinion that a plea comprehension inquiry be conducted if the accused is unrepresented, as he or she may not fully understand the nature and consequences of a plea of guilty. We are of the view that a brief inquiry should also be conducted in cases involving represented accused who wish to plead guilty. This will have the added benefit of avoiding any later suggestion that the accused was misled by counsel.

6.2 The Criminal Justice Review Committee recommends, in accordance with recommendation 55 of the *Martin Committee Report*, that trial judges conduct succinct, plain language plea comprehension inquiries in all cases where a guilty plea is entered.

We also agree with Recommendation 56 of the *Martin Committee Report* that this recommendation is, in pith and substance, a matter of criminal procedure. At present, the law does not require a trial judge to conduct an inquiry in all cases involving a guilty plea.[84] Accordingly, the committee recommends that the Attorney General of Ontario seek an amendment to the *Criminal Code* requiring trial judges to conduct a plea comprehension inquiry whenever a plea of guilty is entered.

6.3 The Criminal Justice Review Committee recommends, in accordance with recommendation 56 of the *Martin Committee Report*, that the *Criminal Code* be amended to require a sentencing judge to conduct a plea comprehension inquiry in all cases where a guilty plea is entered, regardless of whether the accused is represented by counsel.

4. EARLY RESOLUTIONS

The vast majority of criminal cases are resolved by way of a guilty plea. The timing of the entering of these guilty pleas has a tremendous impact on both the effectiveness and the efficiency of the criminal justice system. Historically, 58% of criminal cases were resolved prior to the date of trial, 30% were resolved on the day of trial and 12% were actually litigated.[85] As a result of the high number of last minute resolutions, courtrooms often sat idle for what was to have been a fully scheduled day, and victims and other witnesses were forced to attend court unnecessarily. In addition, expert witnesses, counsel, the judiciary, and police often wasted many hours preparing for trials that did not ultimately proceed.

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[84] *Adgey v. The Queen,* [1975] 2 S.C.R. 426; (1973), 13 C.C.C. (2d) 177.

[85] *Investment Strategy Briefing Note,* Ontario Ministry of the Attorney General, 1992 [Unpublished].

In 1992 the Ontario Ministry of the Attorney General developed what is known as the "Investment Strategy" initiative to improve the operational efficiencies and cost effectiveness of the criminal justice system. Specifically, its intent was to focus the efforts of the justice system on more serious or complex cases and to ensure the effective and timely movement through the system of cases that require the formal court process. One of the major objectives of the Investment Strategy program was to reduce the number of cases unresolved until the day set for trial. The Investment Strategy initiative set measurable case management targets of a pre-trial resolution rate of 72% and a trial rate of 9%. This would reduce the number of cases unresolved until the day of trial from 30% to 19%, with 10% of the cases being resolved on the day set for trial without a trial taking place.

The means used to achieve these results were early charge screening, early disclosure, and early resolution discussions. Province-wide implementation of the Investment Strategy commenced in 1994. The pre-trial resolution rate and trial rate targets were met within eighteen months. The most recent statistics indicate that the Investment Strategy initiative has been a continuing success. The *Investment Strategy Report* prepared by the Ontario Ministry of the Attorney General for the Third Quarter of 1998 indicates that the resolution before trial rate in Ontario was 75.5% and the trial rate was 8.7%. Consequently, the number of cases unresolved until the day set for trial has been reduced to 15.8%. The success of the Investment Strategy initiative in reducing demand on the trial courts has likely played a major role in preventing a second *Askov* crisis.

At present, there are three main impediments to early guilty pleas. First, in a number of locations Crown briefs are not stored in, or in close proximity to, the Crown Attorney's office. This means they are not always readily available when it is convenient for counsel to have plea resolution discussions.

Second, in many areas the courts are not able to immediately accommodate an accused who indicates at an early juncture in the proceedings (*e.g.*, in bail or first appearance proceedings) that he or she wishes to plead guilty. It is not uncommon for an accused person to be told that he or she must wait several hours, or even days, before the court will accept his or her guilty plea and impose sentence.

This is unfortunate. In our view, an accused who wishes to enter a guilty plea should be accommodated as soon as possible. Otherwise, the anxiety that accompanies delay may cause the accused to reconsider his or her position. It is in the interests of the accused, the complainant, and the judicial system to have the plea entered as soon as possible after a resolution agreement is reached.

Finally, in order to ensure that accused persons who intend to plead guilty do so in advance of the day of trial, it is important that in imposing sentence judges abide by the principle that there ought to be less mitigation for a guilty plea entered on the day of trial than a guilty plea entered in advance of the trial. An early guilty plea is deserving of greater mitigation because: (1) it is more likely to be a sign of genuine remorse than a guilty plea entered on the day of trial; and (2) it results in greater cost savings to the criminal justice system.

Accordingly, the Criminal Justice Review Committee recommends that:

6.4 The Ministry of the Attorney General continue to support the Investment Strategy initiative.

6.5 Wherever possible, Crown briefs be stored in, or in close proximity to, the Crown Attorney's office.

6.6 The local trial coordinator, in co-operation with the Crown Attorney and the judiciary, endeavour to ensure that individuals who wish to enter a plea of guilty can do so without delay.

6.7 Crown counsel emphasize in sentencing submissions the principle that, absent exceptional circumstances, there should be less mitigation for a guilty plea entered on the day of trial than for a guilty plea entered in advance of trial.

5. "BEST PRACTICES"

On May 4, 1998, we received a very helpful presentation on Crown early resolution practices from Robert Ash, the Crown Attorney in Newmarket, John McMahon, the Crown Attorney in

Scarborough, and Paul Taylor, the Crown Attorney for Peel Region. They reviewed for us a number of early resolution practices that have proven successful in their court locations. The early resolution "best practices" identified include the following:

- Careful selection of experienced Crown counsel with good interpersonal and negotiating skills to conduct resolution discussions.

- Crown counsel who conduct resolution discussions should have full authority to enter into binding agreements and always be available for resolution discussions with the defence.

- Early contact should take place between the complainant and the Crown so the interests and needs of the complainant can be taken into consideration by the Crown during resolution discussions.

- The accused's first appearance should be scheduled so the Crown can make disclosure of the Crown brief on first appearance.

- A "duty" Crown counsel with resolution skills should be available outside of first appearance court for resolution discussions and information inquiries, to advise police, and to assist complainants.

- Crown counsel should offer a disposition at the low end of the appropriate range of dispositions on an early guilty plea because of the legally recognized mitigating effect of an early guilty plea. Absent exceptional circumstances, the full mitigating effect of an early guilty plea should no longer be available when a plea occurs on the day of trial.

- Crown counsel should take the initiative in contacting defence counsel and not wait for defence counsel to come to the Crown.

- At the time that disclosure is provided, the Crown's office should schedule an appointment for defence counsel to have a resolution meeting with the Crown.

- Where feasible, the local Crown Attorney should ensure the availability, on a daily basis, of a duty Crown to conduct resolution discussions with the defence.

6.8 The Criminal Justice Review Committee recommends that the Ministry of the Attorney General and the federal Department of Justice circulate to Crown counsel a list of early resolution "best practices".

The *Martin Committee Report* notes that both Crown and defence counsel have a professional obligation to meet prior to trial to attempt to resolve various issues.[86] We agree that counsel have a duty to act responsibly in arranging meetings and must respond in a timely manner to initiatives aimed at resolving criminal cases. It should be remembered that resolution discussions not only benefit the administration of justice, but may also benefit the accused.[87]

In Nova Scotia, the *Legal Ethics And Professional Conduct Handbook* explicitly recognizes that defence counsel have a professional obligation to engage in discussions aimed at resolving issues prior to trial. Chapter 10 of the Nova Scotia Rules states:

> When acting as an advocate, the lawyer has a duty to:
>
> (a) represent the client resolutely, honourably and within the limits of the law; and
>
> (b) make every reasonable effort consistent with the legitimate interests of the client to expedite litigation.[88]

We believe a similar rule should be adopted by the Law Society of Upper Canada.

6.9 The Criminal Justice Review Committee recommends that the Law Society of Upper Canada amend Rule 10 of its *Professional Conduct Handbook* to reflect the professional duty of lawyers, when acting as advocates, to make every reasonable effort consistent with the legitimate interests of the client to expedite litigation.

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[86] *Martin Committee Report, supra* at 335.

[87] *E.g.*, by ensuring that cases are resolved expeditiously and by allowing the accused to take advantage of the sentencing principle that there ought to be mitigation in respect of an early guilty plea.

[88] *Legal Ethics And Professional Conduct Handbook,* (Halifax: Nova Scotia Barristers' Society, 1990).

Concern has been expressed to us by members of both the Crown and defence bar that not all members of the judiciary in Ontario are following recommendation 58 of the *Martin Committee Report*, which states:

> The Committee is of the opinion that a sentencing judge should not depart from a joint submission unless the proposed sentence would bring the administration of justice into disrepute, or is otherwise not in the public interest.[89]

As noted by the Martin Committee, "certainty of outcomes facilitates resolution discussions and agreements."[90] Counsel will only enter into resolution agreements if they can be reasonably sure that their joint submission on sentence will be accepted.

> While the presiding judge cannot have his or her sentencing discretion removed by the fact of there being a joint submission, it is none the less appropriate, in the Committee's view, for the sentencing judge to have regard to the interest of certainty in resolution discussions when faced with a joint submission.[91]

It is clear as a matter of law that a sentencing judge is not bound by counsel's joint submission,[92] but a considerable body of appellate authority supports the principle that judges should only depart from a joint sentencing submission in exceptional circumstances.[93] We are of the view that administrative judges should give careful consideration to this principle in the selection of judges to preside in "guilty plea" courts.

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[89] *Martin Committee Report, supra* at 327.

[90] *Ibid.* at 328.

[91] *Ibid.*

[92] *R. v. Rubenstein* (1987), 24 O.A.C. 309; 41 C.C.C. (3d) 91 (C.A.); leave to appeal to S.C.C. refused (1988), 28 O.A.C. 320*n* (S.C.C.).

[93] *R.* v. *Sriskantharajah* (1994), 72 O.A.C. 170; 90 C.C.C. (3d) 559 (C.A.); *R.*. v. *St. Coeur* (1991), 69 C.C.C. (3d) 348 (Que. C.A.); *R.* v. *Pashe (S.J.)* (1995), 100 Man. R. (2d) 61 (C.A.); *R.* v. *Carder (J)* (1995), 174 A.R. 212 (C.A.); *R.* v. *C.D.* (16 September 1994), (Ont. C.A.) [unreported].

6.10 The Criminal Justice Review Committee endorses recommendation 58 of the *Martin Committee Report*, which provides that a sentencing judge should not depart from a joint submission unless the proposed sentence would bring the administration of justice into disrepute, or is otherwise not in the public interest.

CHAPTER SEVEN:
JUDICIAL PRE-HEARING CONFERENCES

[O]n application by the prosecutor or the accused or on its own motion, the court...may order that a conference between the prosecutor and the accused or counsel for the accused, to be presided over by the court...be held prior to the proceedings to consider the matters that, to promote a fair and expeditious hearing, would be better decided before the start of proceedings, and other similar matters, and to make arrangements for decisions on those matters.[94]

1. INTRODUCTION

Section 625.1 of the *Criminal Code* governs judicial pre-hearing conferences. Pursuant to subsection 625.1(1), the court may require the parties to attend a pre-hearing conference, either on its own motion or on application by Crown or defence counsel. Where an accused has elected trial by jury, subsection 625.1(2) mandates that a pre-hearing conference must be held before a judge of the trial court.

Subsection 482(3)(c) of the *Criminal Code* authorizes both divisions of the the Ontario Court of Justice to make rules of court regulating pre-hearing conferences. New rules respecting procedure in the Ontario Court (Provincial Division) came into force on January 1, 1998.[95] Rule 27 of the *Provincial Division Rules* and Rule 28 of the *General Division Rules* regulate the practice and procedure of pre-hearing conferences, and are very similar.[96]

The purpose of a judicial pre-hearing conference is to maximise the use of judicial and other resources by resolving and / or narrowing the issues which must be litigated, and facilitating resolutions where appropriate. The judicial pre-hearing conference is defined in the rules of court as "an informal meeting conducted in chambers at which a full and free discussion of the issues

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[94]*Criminal Code*, R.S.C. 1985, c. C-46, s. 625.1(1).

[95]Rules of the Ontario Court of Justice (Provincial Division) in Criminal Proceedings, C.Gaz. 1997.II.3204.

[96]See Appendix J.

raised may occur without prejudice to the rights of the parties in any proceedings thereafter taking place." In light of this definition, we are of the view that only in the most exceptional of circumstances will it be appropriate for defence or Crown counsel to endeavour to tender evidence relating to the contents of discussions at pre-hearing conferences. [97]

2. PRE-HEARING CONFERENCES IN PRACTICE

There is a great deal of variation throughout the province with respect to the scheduling and conduct of pre-hearing conferences. Each court location has, after experimentation, adopted different practices to suit local needs. The following examples of Ontario Court (Provincial Division) practice illustrate this point.

- In Hamilton, the parties are required to have a pre-hearing conference if the matter is to take more than a half-day; otherwise, the system is very informal and there are no set rules or forms. The parties can ask to have a pre-hearing conference before a particular judge. As well, Crown counsel have authority to deal with all matters not individually assigned, so defence counsel can informally approach any Crown at any time, and simply go and see a judge if one is available.
- In Peel, pre-trial conferences must be scheduled in advance. When pre-trials are heard, the court is closed to the public. The court re-opens for guilty pleas and all other matters that must proceed on the record.
- In many rural areas, where there is only one Provincial Division judge, it is impossible to have a regular system of pre-hearing conferences, since the pre-hearing judge might also be the trial judge. In those situations, visiting judges are often relied upon to conduct pre-hearing conferences.
- At the Old City Hall court in Toronto, parties are required to have a pre-hearing conference if it is anticipated that a matter will take more than a half-day of court time. A date for a conference is obtained from the trial coordinator, and a judge is assigned to hear the pre-trial.

We recognize that it would be inappropriate to mandate a single system of pre-hearing conferences for the whole province. Each court location requires the freedom to experiment with different service delivery models in order to find the system that best suits its needs.

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[97] See *R. v. Larocque*, March 27, 1998, unreported decision of Weekes J., Ontario Court (General Division).

7.1 The Criminal Justice Review Committee recognizes that there is no single system for the scheduling and conducting of pre-hearing conferences suited to all court locations in the province. To date, each location has developed its own system for conducting judicial pre-hearing conferences and, in the opinion of the Committee, it is desirable that each location continue to experiment with, and refine, its own system to suit local conditions.

3. THE ROLE OF COUNSEL AND DISCLOSURE

We are of the view that judicial pre-hearing conferences are an essential component of the criminal justice system. When properly conducted, judicial pre-hearing conferences can shorten proceedings, clarify issues, economise resources, and facilitate resolutions. At present, there are two main obstacles to successful pre-hearing conferences: (1) unprepared or obstinate counsel who are unwilling to take binding positions or obtain instructions in order to clarify issues; and (2) a lack of full and timely disclosure.

With respect to the first issue, we note that the rules of court for both divisions of the Ontario Court of Justice require counsel to appear at pre-hearing conferences. In our opinion, it is implicit that counsel must appear fully prepared and able to deal with issues at the pre-hearing conference. Defence counsel are responsible for all aspects of the preparation and presentation of their client's case, except for certain matters where the client makes the decision based on counsel's advice. Those areas are as follows: whether to plead guilty or not guilty, whether to be tried by a jury or judge alone (in cases where the accused has an election) and whether to take the witness stand. Although defence counsel will obviously be required to abide by their client's instructions on these three matters, counsel have full authority to deal with all other aspects of the case and resolve all other issues where feasible.

The role of defence counsel with regard to these matters is set out in the *Bar Admission Course Criminal Procedure Materials* of The Law Society of Upper Canada as follows:

> ..... once an accused decides to plead not guilty, defence counsel should assume complete control and responsibility over the manner in which the defence will be conducted. It is defence counsel's function to determine the most appropriate course

> of action, always keeping in mind the best interests of the client, and always taking time to keep the client abreast of developments in the case and the reasons for the crucial decisions made.[98]

We are of the view that this principle should be formally adopted as a rule of professional conduct. This will preclude defence counsel from claiming "my client's instructions are that everything is in issue".

7.2 **The Criminal Justice Review Committee recommends that a commentary to Rule 10 of the *Professional Conduct Handbook* be added concerning the role of defence counsel at a judicial pre-hearing conference. The commentary should state that defence counsel are to conduct the defence of their clients as they see fit, within the limits of the law, ethics, and reasonable skill and prudence, subject to the following exceptions, where the client's informed instructions are mandatory:**

- **the client's plea;**
- **the client's election as to mode of trial, where the accused has an election; and**
- **the decision to testify.**

4. "BEST PRACTICES"

The subject of judicial pre-hearing conferences was extensively canvassed by the Martin Committee.[99] We have no wish to duplicate this excellent work and simply suggest that judges continue to be guided by the Martin Committee's recommendations. In addition, to the extent that the recommendations of the Martin Committee with respect to pre-hearing conferences have not been fully implemented, we recommend that they be implemented. Our recommendations are limited to a list of "best practices", which we suggest the proposed local criminal justice co-ordinating committees consider adopting.

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[98]Criminal Procedure Reference Materials, *The Law Society of Upper Canada 40th Bar Admission Course* (Toronto: October, 1998) at 1- 21.

[99]Ontario, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Toronto: Queen's Printer, 1993) at 348 - 385 (Chair: G.A. Martin).

7.3 The Criminal Justice Review Committee recommends that the proposed local criminal justice co-ordinating committees consider adopting the following "best practices".

(a) No judicial pre-hearing conference should be held until a resolution meeting (either by telephone or in person) has been held between counsel. Telephone counsel conference meetings should be encouraged wherever possible, bearing in mind that it is never acceptable for a secretary or other support staff to telephone in the place of counsel.

(b) No judicial pre-hearing conference should be held until the Crown has made initial disclosure.

(c) Where possible, judicial pre-hearing conferences should be scheduled on a remand date. This will ensure that, if necessary, defence counsel is able to confer with his or her client without delay.

(d) A duty court or judge should be made available whenever judicial pre-hearing conferences are scheduled.

(e) At the request of either Crown or defence counsel, the investigating officer should be available for consultation or, if permitted by the judge, to attend the judicial pre-hearing conference.

(f) Where defence counsel feel it is desirable for the investigating officer to be available to attend the judicial pre-hearing conference, he or she should communicate this to the Crown at the counsel pre-trial.

(g) Where defence counsel is going to present information or evidence to Crown counsel for the Crown's consideration, and it can be reasonably anticipated that the Crown will be required to make additional inquiries as a result of that information, defence counsel should do so at the counsel pre-trial so that the judicial pre-trial need not be adjourned.

7.4 The Criminal Justice Review Committee recommends that a judicial pre-hearing conference be mandatory where it is anticipated that a matter will involve a half-day or more of court time or where it is requested by either the Crown or defence.

7.5 To the extent that the recommendations of the Martin Committee with regard to judicial pre-hearing conferences have not been implemented, the Criminal Justice Review Committee recommends that the judiciary and the Attorney General of Ontario take immediate steps to implement the recommendations. Specifically, Crown counsel attending at a

judicial pre-hearing conference must be experienced and have full authority to deal conclusively with issue resolution and guilty plea negotiations.

7.6 **Defence counsel attending at a judicial pre-hearing conference should attend with complete instructions and have full authority to deal conclusively with the matter.**

7.7 **At a minimum, the following issues should be addressed at every pre-hearing conference:**

(a) **whether counsel wish to raise any issues with respect to disclosure;**

(b) **whether the continuity of physical or documentary evidence can be waived, except for certain specific exhibits or documents, or dealt with by way of admission or affidavit evidence;**

(c) **whether affidavits pursuant to ss. 29 and 30 of the *Canada Evidence Act*[100] can be waived;**

(d) **whether there are witnesses who can be waived or whose evidence can be agreed to;**

(e) **where a preliminary inquiry is to be held, whether an out of court discovery is appropriate for any or all witnesses; and**

(f) **whether written submissions on legal or evidentiary issues can be provided to the presiding judge, in place of oral argument.**

7.8 **The Criminal Justice Review Committee recognizes that the judiciary in Ontario is highly qualified and able, but that not every judge may be suited to or interested in conducting judicial pre-hearing conferences. Administrative judges should give careful consideration to the selection of judges conducting pre-hearing conferences. Judges conducting pre-hearing conferences should be experienced in criminal law, knowledgeable with regard to the range of penalty for offences, and be able to facilitate the resolution of issues.**

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[100]R.S.C. 1985, c. C-5.

CHAPTER EIGHT:
CRIMINAL COURT CASEFLOW MANAGEMENT

Nobody wants summary justice. That, however, should not be the alternative. The alternative should be reasonable dispatch, without dilatory tactics and self-indulgence by lawyers, and with judges who are able - and want to - keep things moving.[101]

1. INTRODUCTION

Police, prosecutorial and judicial practices have a great impact on overall case processing times. Courts with speedy case resolution times are generally ones in which the police, prosecutors, and the judiciary have a strong commitment to speedy case processing and have worked cooperatively to develop and maintain effective caseflow management procedures.[102]

Caseflow management refers to the process whereby the movement of cases through the criminal justice system is monitored and controlled to ensure maximum efficiency. The life of a criminal charge is a series of events separated by times during which there is no court activity. The goal of caseflow management is to make the sequence and timing of these events more predictable and more timely. While caseflow management programs are constructed around the events themselves, thoughtful management of the intervals between events will also improve overall charge resolution times.

Caseflow management is strictly an administrative process. It does not directly impact the adjudication of substantive or procedural issues in the case. The resolution of each case on its legal merits should never be compromised by an effective caseflow management system. To the contrary,

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[101]D.A. Sipes & M.E. Oram, *On Trial: The Length of Civil and Criminal Trials* (Williamsburg: National Center for State Courts, 1988) at 85.

[102]B. Mahoney, *Changing Times in Trial Courts* (Washington: National Center for State Courts, 1988) at 194 - 195.

caseflow management enhances the quality of the justice system by ensuring that: cases are heard within a reasonable time; complex cases receive greater judicial attention; and counsel are prepared for each court appearance.

2. IMPROVING ONTARIO'S CASEFLOW MANAGEMENT SYSTEM

At present, delays in applying for and obtaining legal aid, retaining counsel, obtaining disclosure, engaging in resolution discussions, and completing trial preparation too often result in unproductive court appearances and adjournments. An accused in Ontario makes, on average, 5.7 appearances per charge before final disposition.[103] Every appearance by an accused before a judicial officer consumes valuable resources. If the appearance serves no purpose and accomplishes nothing, then resources are wasted.

Many factors contribute to unproductive court appearances and systemic delay. Basic information describing the criminal justice process and indicating the responsibilities of the various participants in the process, including the accused, is not readily available in Ontario. As a consequence, accused persons often wait several weeks, or even months, before applying for legal aid or attempting to retain private counsel, thus necessitating adjournments and engendering delay.

Similarly, in many court locations in the province, the accused cannot obtain disclosure from the Crown at the first court appearance and must attend court a second or third time before disclosure is provided. Thereafter, additional adjournments may be necessary to afford the accused the opportunity to review the disclosure materials and engage in plea negotiations with the Crown. All too often, the Crown is not prepared to advise the defence of the Crown's position in the event of

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[103]Based upon ICON data collected between January 1 and July 1, 1997, in the following judicial districts: Algoma, College Park, Essex County, Frontenac, Hamilton, Metro East, Metro North, Metro West, Middlesex, Niagara North, Old City Hall, Ottawa, Peel Region, Perth, Simcoe, Sudbury, Thunder Bay and York Region.

a guilty plea until the defendant's third or fourth court appearance. In the absence of judicial direction and a sense of urgency, several months may pass before any concrete action is taken with respect to a charge.

In our opinion, it is imperative that a comprehensive caseflow management system be established throughout the province to address these problems. While there are, at present, effective caseflow management systems operating in a number of court locations,[104] it is crucial that caseflow management systems be implemented province wide in order to maximize efficiency, ensure that all accused persons are tried within a reasonable time, and enhance public confidence in the criminal courts.

8.1 The Criminal Justice Review Committee recommends that the proposed provincial criminal justice co-ordinating committee and the proposed local criminal justice co-ordinating committees facilitate effective caseflow management throughout the province.

We recognize that there is no single model of a successful criminal court caseflow management system. Successful courts have used a variety of techniques and have adapted the details of their program to local conditions.[105] However, recent experience in Ontario during the "backlog blitz" has demonstrated the importance of judicial commitment to the success of a caseflow management system. If judges are not committed to the philosophy of court responsibility for case progress, then little can be gained by devising systems for establishing deadlines and tracking cases. In consultation with the Crown and defence counsel, judges must play an active role in determining the timetable which will govern the proceedings, and must be diligent in enforcing compliance with those deadlines.

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[104] *E.g.*, Brampton, Newmarket, Scarborough, Stratford and Windsor.

[105] Mahoney, *Changing Times in Trial Courts, supra* at 197.

While final responsibility for the operation of the system lies with the courts, all justice partners must be active participants in the development and evaluation of the system. Elsewhere in this report,[106] we have recommended, in addition to the creation of a provincial criminal justice co-ordinating committee, the establishment in each court location of a local criminal justice co-ordinating committee. We believe that these committees could play a central role in the creation of caseflow management systems which will accommodate local needs and conditions.

8.2 The Criminal Justice Review Committee recognizes that there is no single caseflow management system suited to all court locations in the province. Caseflow management systems should be developed locally to accommodate local needs, conditions and available judicial and other resources. While final responsibility for the operation of the system lies with the courts, all justice partners must be active participants in the development and evaluation of the system.

8.3 The Criminal Justice Review Committee has concluded that judicial commitment and leadership are critical components of an effective caseflow management system. The judiciary should be encouraged to play an active role in determining the timetable which will govern proceedings and must be diligent in enforcing compliance with those deadlines.

3. ELEMENTS WHICH SHOULD BE INCORPORATED INTO LOCAL CASEFLOW MANAGEMENT SYSTEMS

Successful caseflow management systems:

(a) encourage all participants in the criminal justice process, including the accused, to discharge their responsibilities as soon as possible;

(b) facilitate plea negotiations between the Crown and defence and encourage early guilty pleas;

(c) provide reliable and predictable trial date scheduling;

(d) establish appropriate goals and guidelines; and

(e) monitor system performance.

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[106] See Chapter Eleven.

A. Encouraging the Accused to Address the Issue of Legal Representation at an Early Juncture

When an accused requests an adjournment during the course of his or her first or second court appearance, it is typically for the purpose of applying to the Ontario Legal Aid Plan or retaining counsel. Thereafter, most adjournments are requested in order to obtain disclosure, to engage in plea negotiations with the Crown, or to interview witnesses. As discussed in Chapter Four, we believe the criminal justice system will function more efficiently if accused persons are provided with more information regarding the court process, are encouraged to apply for legal aid prior to their first court appearance and, if eligible, receive legal aid as soon as possible.

B. Facilitating Plea Negotiations and Encouraging Early Guilty Pleas Where Appropriate

As discussed in Chapter Six, it is our opinion that the efficient operation of the criminal courts can be enhanced through the adoption of a variety of Crown, defence, and judicial best practices intended to facilitate meaningful resolution discussions and to encourage defendants who wish to plead guilty to do so at the earliest possible juncture in the proceedings.

C. Scheduling Credible Trial Dates

Trial date certainty increases the probability that witnesses will attend court on the scheduled date, thus reducing the number of adjournments. Providing reliable and predictable event dates minimizes confusion and uncertainty for complainants and other witnesses, the accused, counsel, courts administration and the judiciary. Certainty that trials or other events will occur when scheduled is a critical component of an effective caseflow management system. Public respect for the administration of justice is also enhanced when courts operate in an efficient and cost effective manner. A court that does not inspire confidence in its procedure for scheduling cases will also encounter difficulty in engendering confidence in the quality of its decision.

Unfortunately, counsel often contribute to trial date uncertainty by providing inaccurate time estimates. If they overestimate the amount of time required for a case, the most efficient use cannot be made of court space. An underestimate of required time means that the case must be adjourned. The breaking up of a trial over an extended period of time, a not infrequent occurrence in the

Provincial Division, is extremely inefficient because counsel and the court have to repeat their case preparation each time the case comes up.

D. The Establishment of Appropriate Goals And Guidelines

At present, there is considerable disparity across Ontario with respect to charge-processing times. In order to ensure that all accused persons are tried within a reasonable time, it is imperative that province-wide standards be adopted to govern the completion of the intermediate steps in the trial process. In our opinion, barring exigent circumstances, the following standards should be adhered to in all court locations.

i. General Principles

Court appearances for an accused should only be scheduled when legally necessary; for example, to establish jurisdiction over the offender and offence, to make an election as to mode of trial, or to enter a plea. As a general rule, the number of pre-trial appearances, exclusive of the bail hearing, judicial pre-trial and preliminary inquiry, should be limited to three.

ii. Prior to the Accused's First Court Appearance

Barring special circumstances, the police should provide the Crown with two copies of the crown brief within four weeks of charges being laid. As soon as the Crown is in receipt of its copy of the brief, an experienced Crown counsel should review the brief and determine what materials should be disclosed. Experienced Crown counsel should also screen the charges. Efficiency is increased if the Crown who screens the charge is also the Crown who ultimately conducts resolution discussions with the defence concerning the charge.

iii. First Appearance [or Intake] Court

The first appearance[107] should be scheduled so as to allow adequate time for:

- the accused to apply for legal aid or retain private counsel;
- the police to provide the Crown with two copies of a high quality brief; and

[107] As defined in Chapter Four.

- the Crown to screen the charges.

In the case of an out-of-custody accused, it is recommended that the first appearance be scheduled no later than six weeks from the date upon which the appearance notice or summons was issued. Where local conditions allow, appearances in intake court should be staggered so as to prevent courtroom overcrowding and to ensure that the accused does not have to spend hours in court, waiting for his or her case to be called.

At the first appearance, the Crown should:

- withdraw any charges which fail to satisfy the reasonable prospect of conviction / public interest test set out in the *Martin Committee Report* and the Crown Policy Manual;
- where appropriate, refer the accused to a program of alternative measures; and
- provide a copy of the disclosure package to the accused or his or her counsel. Accused persons should be advised that if the disclosure materials are lost or stolen there will be a charge for replacement copies.

In addition, where the accused is charged with a hybrid offence and the investigation has been completed, Crown counsel should indicate whether the Crown will be proceeding summarily or by indictment.

Efficiency is enhanced if two Crown counsel and two duty counsel are assigned to busy intake courts. While one Crown and one duty counsel deal with matters in court, the other two can conduct resolution discussions outside of court. If the accused is unrepresented but has a *bona fide* excuse for his or her failure to obtain legal representation, then the second appearance should be scheduled approximately four to six weeks from the date of the first appearance so as to afford the accused additional time to apply for legal aid or retain private counsel. Otherwise, the adjournment between the first and second appearances should be brief.

iv Second Appearance

Accused persons who intend to be represented should appear with counsel at their second appearance

and counsel should "get on the record". If they have not already done so, the Crown and defence should meet to discuss the possibility of a plea or to narrow the issues for trial. This meeting should be conducted prior to the accused's third appearance.

v. Third Appearance

The accused should be asked to enter a plea and, where applicable, make an election as to the mode of trial. Depending upon that election, a date should then be set for a judicial pre-hearing conference, preliminary inquiry, or trial.

Recommendations:

In order to ensure that all accused persons in Ontario are tried within a reasonable time, it is imperative that province-wide standards be adopted to govern the completion of the intermediate steps in the trial process. Court appearances should only be scheduled where legally necessary. As a general rule, the number of pre-trial appearances, exclusive of any bail hearing, judicial pre-hearing conference or preliminary inquiry, should be limited to three.

In the opinion of the Criminal Justice Review Committee the following guidelines are appropriate and should be adopted throughout the province:

8.4 Unless special circumstances exist, within four weeks of charges being laid, the police should provide the Crown with two copies of a high quality Crown brief. In prosecutions involving more than one accused, the police should provide the Crown with one copy of the brief for each accused, plus one copy for the Crown.

8.5 Prior to the accused's first appearance,[108] an experienced Crown counsel should review the brief and determine what materials should be disclosed. Experienced Crown counsel should also screen the charges.

8.6 The first appearance should be scheduled so as to allow adequate time for: the accused to apply for legal aid or retain private counsel; the police to provide the Crown with two copies of a high quality brief; and

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[108] As defined in Chapter Four.

the Crown to screen the charges. In the case of an out-of-custody accused, it is recommended that the first appearance be scheduled no later than six weeks from the date upon which the appearance notice or summons was issued.

8.7 Where local conditions allow, appearances in intake court should be staggered so as to prevent courtroom overcrowding and to ensure that accused persons do not have to spend hours in court, waiting for their cases to be called.

8.8 At the time of the accused's first appearance, the Crown should:

- **withdraw any charges which fail to satisfy the reasonable prospect of conviction / public interest test set out in the *Martin Committee Report* and the Crown Policy Manual;**
- **where appropriate, refer the accused to a program of alternative measures;**
- **in the case of a hybrid offence, providing that the police investigation has been completed, indicate whether the Crown will be proceeding summarily or by indictment; and**
- **provide a copy of the disclosure package to the accused or his or her counsel. Accused persons should be advised that if the disclosure materials are lost or stolen, there will be a charge for replacement copies.**

8.9 Efficiency is enhanced if two Crown counsel and two duty counsel are assigned to busy intake courts. While one Crown and one duty counsel deal with matters in court, the other two can conduct resolution discussions outside of court.

8.10 If the accused is unrepresented but has a *bona fide* excuse for his or her failure to obtain legal representation, the second appearance should be scheduled approximately four to six weeks from the date of the first appearance so as to afford the accused additional time to apply for legal aid or retain private counsel. Otherwise, the adjournment between the first and second appearances should be brief.

8.11 Accused persons who intend to be represented should appear with counsel at their second appearance and counsel should "get on the record". If they have not already done so, the Crown and defence should meet to discuss the possibility of a plea or to narrow the issues for trial. This meeting should be conducted prior to the accused's third court appearance.

8.12 At the outset of the accused's third court appearance, the accused should be asked to enter a plea and, where applicable, make an election as to the mode of trial. Depending upon that election, a date should then be set for either a judicial pre-hearing conference, preliminary inquiry, or trial.

CASEFLOW MANAGEMENT SYSTEM

< max. 6 weeks >	**1st**	< max. 4 weeks >	**2nd**	< counsel conference >	**3rd**	**4th**
ARREST or STATUTORY RELEASE	DISCLOSURE and CHARGE SCREENING FORM PROVIDED CROWN ELECTION	APPEAR WITH COUNSEL IF RETAINED		DEFENCE ELECTION PLEA SET DATE FOR TRIAL, PRE-TRIAL or PRELIMINARY INQUIRY		TRIAL

---------- ALTERNATIVE MEASURES AVAILABLE AT ANY TIME ----------

E. A Monitoring and Information System

There is little point in establishing goals and guidelines for a caseflow management system without also implementing a system which is capable of monitoring systemic performance. As discussed in the introduction to this report, the Ministry of the Attorney General of Ontario and the Ministry of Solicitor General and Correctional Services, in cooperation with a consortium of private sector companies, is working to develop a unified information technology system (the Integrated Justice Project) for use by law enforcement agencies, Crown counsel, the courts and corrections. In our opinion, the information technology system which is ultimately developed should be capable of tracking cases through the criminal justice system and generating relevant and timely information regarding their progress.

8.13 The Criminal Justice Review Committee recommends that the Integrated Justice Project endeavour to develop a system which is capable of tracking the progress of cases through the criminal justice system and generating information regarding:

- **total time to case disposition for each major case classification;**
- **elapsed time between major case events; and**
- **number of appearances, pretrial resolution rates, trial rates and annual disposition rates.**

4. VIDEO REMANDS AND LEGISLATIVE REFORM

Until recently, the *Criminal Code* stipulated that an accused could not be remanded in-custody for a period of more than eight days.[109] The purpose of this rule was to prevent accused persons from languishing for lengthy periods in prison, waiting for trial. The eight- day remand rule was recently repealed.[110] However, large numbers of in-custody accused continue to be brought before the courts for appearances which serve no other purpose than to remind the court that the accused is still in

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[109] Section 537(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46 permitted a justice to grant an interim adjournment but stipulated that "no adjournment shall be for more than eight days" unless certain conditions were met.

[110] Section 53 of the *Criminal Law Amendment Act*, S.C. 1994, c. 44, dispensed with the eight day limitation.

custody, awaiting trial. Not only is it extremely costly to transport large numbers of prisoners to courthouses for remand appearances, but it also raises security concerns. Each time a prisoner is removed from a secure facility and transported to a public place, there is an increased risk that the prisoner will escape or obtain contraband. As a result of the risks and costs associated with prisoner transport, the province has been experimenting with the use of video-conferencing equipment to conduct remand proceedings. At present, there are three locations which have video remand capabilities: London, Ottawa and Toronto.

We have been advised that the federal government is currently considering amending the *Criminal Code* to allow for the implementation of an "out of court" intake model. Pursuant to this approach, an accused would be required to personally attend only his or her first procedural court appearance. Thereafter, all routine matters could be dealt with out of court, by the accused's lawyer or agent.[111] In other words, the accused would only be required to attend court when some substantive (as opposed to merely procedural) action was to be taken concerning the case.

8.14 The Criminal Justice Review Committee recommends that the federal government give priority to the development and enactment of an "out of court" intake procedure for the criminal courts.

8.15 In the absence of *Criminal Code* amendments implementing an effective "out of court" intake model, the Criminal Review Committee recommends that the province continue developing and evaluating video remand capability.

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[111] See: *Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services, Volume I* (Toronto: Queen's Printer, 1997) at 153 (Chair: J.D. McCamus).

CHAPTER NINE:
TRIAL PROCEDURE, EVIDENCE, AND PRELIMINARY INQUIRIES

> *Like it or not, there is an ever-increasing sense of frustration, if not despair, festering within trial judges throughout this country. Many feel that the criminal trial has become an exercise in futility. Many believe that we have lost sight of its primary purpose. Few feel confident in their ability to conduct such a trial from start to finish without committing reversible error. Regularly, these fears prove to be well founded.*
>
> *The simple truth is that, with every passing day, criminal trials are becoming more difficult, time consuming and complex.*[112]

1. INTRODUCTION

Trials in Ontario have become longer and more complex in recent years. To a great extent, this is as a result of the enactment of the *Canadian Charter of Rights and Freedoms*.[113] The development of the criminal law since the advent of the *Charter* has reflected the evolution of society's concept of human and legal rights. Many rights which once existed only at common law now have constitutional, and hence far weightier, status. The constitutional rights of the accused are now often the focus of criminal litigation. The complicated and sophisticated analyses of *Charter* issues mandated by the Supreme Court of Canada means that the amount of evidence required is greater. The development of the *Charter* is reflected not only in rights analysis, but in the development of new "*Charter* defences," the legitimacy of which must be litigated.

Developments in the law of evidence have also resulted in longer trials: for example, evolution in the rule against hearsay has resulted in many more statements being videotaped and transcribed. These lengthy statements are sometimes played *verbatim* in court. Similarly, the development of new investigative techniques, such as DNA "fingerprinting", means that more experts are required, more

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[112]M. Moldaver, "The Impact of the *Charter* on the Criminal Trial Process - A Trial Judge's Perspective" in J. Cameron, ed., *The Charter's Impact on the Criminal Justice System* (Scarborough: Carswell, 1996) 143 at 144.

[113]Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11.

scientific evidence is called, and more exhibits are entered into evidence. The admissibility of all of this "new" evidence is usually litigated. As a practical matter, complicated trials and preliminary inquiries take up an enormous amount of court time.[114] We have made several recommendations that may help to reduce the time and resources required for preliminary inquiries and trials. Except where otherwise stated, all of the comments and recommendations in this chapter apply to both preliminary inquiries and trials.

2. RULES OF COURT

Neither the *Rules Respecting Criminal Proceedings*,[115] nor the *Rules of the Ontario Court of Justice (Provincial Division)*[116] contain specific rules regarding trial procedure or procedure on preliminary inquiries.

Section 482 of the *Criminal Code* empowers the Ontario Court (General Division), as the superior court of criminal jurisdiction in the province, and the Ontario Court (Provincial Division), when sitting as the trial court in non-jury indictable matters and absolute jurisdiction matters, to make rules:

- generally to regulate the duties of officers of the court and any other matters considered expedient to attain the ends of justice and carry into effect the provisions of the law;
- to regulate the sittings of the court or any division thereof, or any judge of the court sitting in chambers, except in so far as they are required by law; and
- to regulate in criminal matters the pleading, practice and procedure in the court including pre-hearing conferences held pursuant to s. 625.1of the *Criminal Code* and proceedings with respect to judicial interim release.

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[114]We note that the English criminal justice system appears to be able to complete comparable cases in far less time.

[115]Canada, Rules Respecting Criminal Proceedings, C.Gaz. 1992.II. 2298.

[116]Rules of the Ontario Court of Justice (Provincial Division) in Criminal Proceedings, C. Gaz. 1997.II.3204.

To date, both the General and Provincial Divisions have adopted rules to regulate a variety of pre-trial matters. In addition, the Provincial Division has adopted a small number of rules governing certain trial matters, such as *Charter* motions. In our opinion, considerable savings in court time and resources may be achieved through the enactment of rules which would allow for expanded use of affidavit evidence, the option of bringing motions in writing, and the use of time limits on oral arguments and / or written submissions.

3. ADMISSIONS OF FACT AND THE USE OF AFFIDAVIT EVIDENCE

We believe that greater use should be made of admissions of fact and affidavit evidence in the criminal courts. More widespread use of affidavits could shorten proceedings by reducing the number of witnesses, limiting the amount of *viva voce* evidence called, and allowing the trier of fact to study the evidence without using up court time. There are numerous precedents in the *Criminal Code* and other federal legislation for facts to be established by affidavit, rather than *viva voce* evidence:

- s. 53(1) of the *Controlled Drugs and Substances Act*[117] provides that the continuity of drug exhibits may be established by way of affidavit;
- pursuant to s. 258(1)(g) of the *Criminal Code*, the operator of a breath analysis machine may submit a certificate regarding the blood alcohol content of the breath sample; and
- pursuant to s. 51(1) of the *Controlled Drugs and Substances Act* a drug analyst may submit a certificate indicating the type of drug that he or she has analysed.

In each case, the affiants may be cross-examined with leave of the court.

In our opinion, there are several other areas where affidavit evidence could be routinely tendered in place of *viva voce* evidence.

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[117] S.C. 1996, c. 19.

A. Continuity of Evidence

In many trials there is physical evidence (*e.g.* documents, DNA samples, fingerprints, tapes / transcripts of intercepted communications) that must be presented to the court. Before these physical exhibits can be received into evidence, a chain of continuity must be established by the Crown. In the vast majority of cases, the continuity of the evidence is not controversial and is not seriously challenged by defence counsel. In our view, there is no reason why continuity cannot be admitted by counsel for the purpose of dispensing with proof thereof, pursuant to s. 655 of the *Criminal Code*.

If non-controversial matters cannot be resolved by way of agreement between counsel, it is open to the Crown to submit continuity evidence by way of affidavit in order to shorten proceedings and dispense with unnecessary witnesses. In addition, this issue should be canvassed at a judicial pre-trial conference.

The Criminal Justice Review Committee recommends that:

9.1 The model pre-trial conference form prompt the parties and the trial judge to consider whether the continuity of physical evidence is in issue.

9.2 The *Criminal Code* be amended to provide for the use of affidavit evidence to prove the continuity of physical exhibits. Cross-examination of the affiants should only be permitted with leave of the trial or preliminary inquiry judge.

9.3 In the absence of a *Criminal Code* amendment, rules of court should be drafted for both the General and Provincial Divisions which would provide for the use of affidavit evidence to prove the continuity of physical exhibits. Cross-examination of the affiants should only be permitted with leave of the trial or preliminary inquiry judge.

B. Non-Contentious Witnesses at Preliminary Inquiries

At some preliminary inquiries, the evidence of several witnesses may be required in order to obtain a committal for trial. However, the defence may only be interested in cross-examining one or two of those witnesses. The evidence of non-contentious witnesses should, therefore, be the subject of

a statement of fact agreed upon by counsel or the evidence should be tendered by the Crown by way of affidavit. The model pre-trial form[118] should prompt the parties to consider whether such evidence could be led by way of agreed statement of fact or affidavit.

9.4 The Criminal Justice Review Committee recommends that the model pre-trial conference form prompt the parties and the trial judge to consider whether the evidence of non-contentious witnesses can be tendered by way of agreed statement of fact or affidavit.

C. Time/Date/Place of Intercepted Private Communications and "911" Calls

Where private communications are intercepted, a monitor notes the time and date of the communication, and the place of interception. Proving the time, date, and place of an intercepted communication by *viva voce* evidence can be a lengthy and time-consuming process. In addition, the time, date, and place are seldom seriously challenged – it is usually the content of the communication that is at issue. Calls to "911" are monitored in the same fashion; thus, "911" evidence raises substantially the same issues as wiretap evidence, at least insofar as the interception/reception aspect is concerned. In our opinion, recordings from wiretap and "911" monitors regarding time, date, and place of interception/reception should be submitted by way of agreed statement of fact or affidavit at both the trial and preliminary inquiry.

The Criminal Justice Review Committee recommends that:

9.5 The *Criminal Code* be amended to provide for the use of affidavit evidence to prove the time, date, and place of interception of private communications. Cross-examination of the affiants should be permitted only where leave of the trial or preliminary inquiry judge is obtained.

9.6 The *Criminal Code* be amended to provide for the use of affidavit evidence to prove the time, date, and place of reception of "911" calls. Cross-examination of the affiants should be permitted only where leave of the trial or preliminary inquiry judge is obtained.

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[118] See Appendix K.

9.7 In the absence of a *Criminal Code* amendment, Provincial and General Division rules should be drafted which would allow for the reception of affidavit evidence proving the time, date, and place of intercepted private communications and "911" calls. The rules should stipulate that cross-examination of the affiants is only permitted where leave of the trial or preliminary inquiry judge is obtained.

4. DEFENCE DISCLOSURE

There are occasionally situations where defence counsel calls an expert witness whose *curriculum vitae* and anticipated evidence are not provided to the Crown in advance of his or her testimony. At present, there is no obligation on defence counsel to make such disclosure. However, there is also no advantage to holding it back, because the Crown will inevitably obtain an adjournment to consider and prepare for this evidence. Refusing to make disclosure of the *curriculum vitae* and anticipated evidence of defence expert witnesses causes delay and is a waste of the criminal justice system's valuable resources. We are of the view that there should be a positive obligation on defence counsel to disclose, in advance of the trial date where possible, the *curriculum vitae* and anticipated evidence of any expert witnesses the defence intends to call.[119] We note, however, that concern has been expressed to us about the Crown making use of disclosure provided by the defence.

The Criminal Justice Review Committee recommends that:

9.8 There be a positive obligation on defence counsel to disclose, in advance of the trial date where possible, the *curriculum vitae* and anticipated evidence of any expert witnesses the defence intends to call.

9.9 The model Provincial Division and General Division pre-trial forms[120] prompt the parties to consider whether there will be defence experts, and ask defence counsel whether disclosure has been made. The forms should indicate that where the defence fails to make disclosure, an adjournment will be granted to the Crown, if requested.

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[119]See also, Ontario, *Report of the Commission on Proceedings Involving Guy Paul Morin* (Toronto: Queen's Printer, 1998) at 357 - 358 (Chair: F. Kaufman).

[120]See Appendix K.

9.10 The proposed Ontario Attorney General and Solicitor General's co-ordinating committee on Crown disclosure consider the issue of how the proposed defence disclosure requirement can be implemented without unfairly prejudicing the accused.

5. MOTIONS IN WRITING

There are often motions during the life of a criminal charge which are uncontested, or are otherwise not particularly controversial. In our opinion, precious court time would be saved if motions of this nature could be made in writing and filed with the court office, rather than requiring counsel to appear in court to bring the motion. Examples of motions which might be dealt with out of court include:

- motions to open the "sealed package" containing an affidavit in support of an authorization to intercept private communications;
- uncontested motions to vary the conditions of bail;
- consent motions to release exhibits for scientific testing; and
- uncontested motions to adjourn proceedings (other than trial dates).

In some parts of the province, motions of this nature are already dealt with in writing, and there is no reason why this practice should not be expanded. While critics of this procedure contend that it usurps the function of the trial judge to permit the parties to make uncontested motions in writing without the necessity of a court appearance, we are of the view that allowing consent motions to be made in writing in no way usurps the judicial function - judges are free to reject any motion put before them, even if the other party consents. Judges still independently exercise their power and authority.

9.11 The Criminal Justice Review Committee recommends that the rules of the Ontario Court of Justice be amended to allow the parties to a criminal proceeding to bring uncontested motions and applications in writing.

6. TIME LIMITS AND WRITTEN SUBMISSIONS

The time that courts have available to hear argument and submissions in a criminal case is not unlimited. The Supreme Court of Canada and the Ontario Court of Appeal have recognized this fact, and have imposed time limits accordingly. We recognize that it is not a simple task to determine the appropriate limits to be placed on the amount of time taken by counsel at trial to call *viva voce* evidence and cross-examine. Unlike appellate courts, trial courts are seldom provided with written submissions prior to hearing oral argument.

We are strongly of the view that much greater use should be made of written submissions on pretrial motions and at trial. Moreover, we see no reason why time limits cannot be placed on oral submissions and argument on pretrial motions and at trial. Time limits would be especially helpful during non-jury and non-trial proceedings, such as applications for prerogative remedies, arguments relating to committals for trial, arguments relating to *Charter* applications and other pre-trial motions, and *voir dires*. Greater use of written submissions would also reduce the amount of court time needed for argument.

In our opinion, trial judges already have common law discretion to impose time limits on oral arguments or to request that submissions be made in writing. This discretion is derived from the authority of judges to control and regulate proceedings in their own courtrooms. We are of the view, however, that a permissive rule explicitly authorising judges to place time limits on oral arguments and / or require submissions in writing should be adopted. By adopting a rule, it is hoped that more trial courts will be encouraged to make use of these powers.

9.12 The Criminal Justice Review Committee recommends that the common law authority of trial judges of the Ontario Court of Justice to place time limits on oral argument and / or require submissions to be made in writing be embodied in a rule of court. This rule should be strictly permissive.

7. PRELIMINARY INQUIRIES

We are aware that the federal government is considering changes to the *Criminal Code* which would have a major impact on the availability and scope of preliminary inquiries. A number of members of the Criminal Justice Review Committee, and the organizations they represent, have very strong views on the merits of the proposed changes. The Co-chairs have decided that it would not be appropriate for this Review, which is a combined initiative involving the judiciary, to take a position on reforms that are currently the subject of extensive political discussion.

We have deliberately limited our comments to offering some modest suggestions on how preliminary inquiries, in their current form, can be conducted so they do not consume an inordinate amount of court time. In our experience, most preliminary inquiries do not consume an inordinate amount of court time.[121] A small number of preliminary inquiries do, however, become bogged down on issues which have little to do with determining whether or not there is enough evidence to commit the accused for trial. These preliminary inquiries have garnered a great deal of media attention and have, no doubt, stimulated discussion about the continued utility of preliminary inquiries, particularly in view of the constitutional right to Crown disclosure now clearly established by the Supreme Court of Canada.

Many preliminary inquiries are not contested, in the sense that there is no issue with regard to committal for trial. Defence counsel often indicate that they simply wish to cross-examine one or two witnesses in relation to certain issues. In other words, they wish to use the preliminary inquiry as a discovery tool.[122] In those cases, the preliminary inquiry judge has very little to do. There is often no need even for the presiding judge to make evidentiary rulings.

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[121]Based on ICON statistics for the first three months of 1997. According to the Ministry of the Attorney General's Court Statistics Annual Report: Fiscal Year 1996-1997 (Toronto: February, 1998) [unpublished] at Table 10.2, 172,631 Provincial Division court hours (approximately 14,386 hours / month) were spent on criminal law matters during the 1996 - 1997 fiscal year. During January, February and March, 1997, ICON statistics indicate that approximately 986.25 Provincial Division court hours were spent on preliminary inquiries. [986.25 ÷ 14 386 = 6.85%]

[122]*Re Cover and the Queen* (1988), 44 C.C.C. (3d) 34 (Ont. HC); *R. v. George* (1991), 5 O.R. (3d) 144; 69 C.C.C. (3d) 148 (C.A.).

In a small number of cases, preliminary inquiries have been conducted in the following manner:

- Defence counsel agrees on the record that there is no issue as to committal for trial. The matter is then remanded to a date in the future.
- In the interim, the witness' testimony is either taken by a special examiner, or the witness is asked to swear an oath and his or her evidence is recorded by a court reporter. Counsel agree in advance on the witnesses that will be required, and upon the scope of the examination-in-chief (if any) and the cross-examination. In some cases there has been a judge available in case a ruling is necessary.
- After the evidence is taken, counsel then return to court, the accused is put to his or her election, and the preliminary inquiry is formally waived. The transcript of evidence is available for later use.

This "discovery" model is in limited use in Ottawa and has been used on occasion in Toronto. Since a discovery obviates the need for a judge, court security, court staff, and even a courtroom (only a court reporter is required), it offers the possibility of real savings to the criminal justice system. There is no specific authority in the *Criminal Code* to conduct preliminary inquiries in this manner. Accordingly, the use of a discovery model is dependent upon the consent of counsel.

It must be recognized that many cases are not suited to the discovery model. It seems unlikely, for example, that cases involving child witnesses or traumatised complainants will ever be appropriate for this model. However, large cases involving many documents and either investigators or third party witnesses (such as *Income Tax Act*,[123] *Competition Act*,[124] stock manipulation, and fraud cases) may be suitable cases in which to use a discovery model. Preliminary inquiries involving complicated financial or business transactions sometimes tie up a courtroom and a judge for months and there may be substantial savings if these cases are conducted "out of court" by responsible

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[123]R.S.C. 1985 (5th Supp.), c. 1.

[124]R.S.C. 1985, c. C-34.

counsel.[125] The discovery model has also been used on at least one occasion in a murder case where the primary issue related to the accused's mental capacity and the testimony consisted largely of expert evidence.

The Criminal Justice Review Committee recommends that:

9.13 Counsel consider conducting out-of-court discoveries, and waiving the preliminary inquiry, in appropriate cases.

9.14 The model Provincial Division pre-trial form[126] prompt the parties and the judge at a judicial pre-hearing conference to consider whether an out-of-court discovery might be appropriate.

9.15 A Provincial Division rule and a protocol for the conduct of "discovery" preliminary inquiries be drafted to regulate the conduct of discoveries. The rule and the protocol should incorporate the following features:

(a) discoveries should only be conducted with the written consent of both the Crown and defence counsel;

(b) a judge should be available upon application to make rulings if necessary;

(c) counsel should sign an undertaking indicating that they will abide by the rulings of the judge;

(d) counsel should be required to sign an agreement indicating which witnesses are to be called at the discovery proceedings and what issues will be canvassed; and

(e) the accused should sign an agreement permitting the reading in at trial of evidence taken at the discovery proceedings even if the accused was not present when the evidence was taken.

A model discovery protocol is attached to the Report as Appendix L.

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[125] Concern has been expressed to us that without a judicial officer present to prevent abusive examinations or cross-examinations by irresponsible or undisciplined counsel, there is a very real danger that an out-of-court "discovery" hearing can become counter-productive. These are considerations that counsel will have to take into account when deciding whether to agree to an out-of-court discovery hearing.

[126] See Appendix K.

CHAPTER TEN:
ALTERNATIVE MEASURES

> *...[T]he criminal law is a blunt instrument of social policy that ought to be used with restraint. The criminal law aims to achieve rehabilitation, specific deterrence, general deterrence, and the protection of society. However, there is no reason to think that the criminal law is the only method of achieving these socially desirable goals. Accordingly, it is clearly in the public interest to consider the existing alternatives to any given prosecution, and their efficacy, remembering that these alternatives may be able to deal more sensitively and comprehensively with the particular problem at hand, while at the same time meeting the goals of the criminal justice system.*[127]

1. INTRODUCTION

We agree with the submission of Chief David Boothby of the Toronto Police Service that one of the factors that has led to criminal courts being backlogged is the number of charges laid by police that do not merit the full attention of the criminal court process. Once laid, it is often very difficult to deal with these charges short of a trial because the parties feel very strongly about them and will not consider any resolution other than a complete withdrawal or a full-blown trial.[128] One means of eliminating charges which do not warrant the full attention of the court based criminal process is through alternative measures.

Alternative measures are defined in s. 716 of the *Criminal Code*[129] and s. 2(1) of the *Young Offenders Act*[130] as "measures other than judicial proceedings" used to deal with a person, alleged to have committed an offence. Victim-offender mediation, sentencing circles, and diversion

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[127]Ontario, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Plea Resolution Discussions* (Toronto: Queen's Printer, 1993) at 96 (Chair: G.A. Martin).

[128]Submission of Chief David Boothby, Metropolitan Toronto Police, dated 14 April 1998 at 2.

[129]R.S.C. 1985, c. C-46.

[130]R.S.C. 1985, c. Y-1.

programs are examples of alternative measures. The alternative measures (diversion) policy of the Department of Justice (Canada) is attached as Appendix M.

A. Victim-Offender Mediation

Victim-offender reconciliation programs have been operating in some parts of Ontario for more than two decades. Although the nature and extent of both victim and offender involvement varies from program to program, most require the offender to meet the victim face-to-face, in the presence of a trained mediator, in order to discuss the victimization, express views and feelings, and negotiate a compensation agreement. One of the prerequisites of most mediation programs is that entry be voluntary on both the part of the offender and the victim.

If the parties are successful in reaching an agreement as to how to resolve their dispute, a written copy of their agreement is then given to the Crown for consideration. While the Crown is not legally bound by the terms of the agreement, if the complainant expresses the desire to have the charges withdrawn, the prosecutor will generally comply.

B. Community Councils

The difficulties encountered by aboriginal Canadians at the hands of the criminal justice system are now well documented. Native Canadians are highly over-represented in the justice system, both as accused persons and as inmates of correctional facilities.[131] Suicide rates amongst aboriginal prisoners are alarmingly high, as are recidivism rates.

In response to these concerns, native leaders, in co-operation with local Crown Attorneys and the police, have established a small number of community councils in various locations throughout the province. The purpose of community councils is to return a greater degree of responsibility to the

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[131] See D. Kwochka, "Aboriginal Injustice: Making Room for a Restorative Paradigm" (1996), 60 Sask. L.R. 153 at 154 - 155. See also: Law Reform Commission of Canada, *Report on Aboriginal Peoples and Criminal Justice: Equality, Respect, and Search for Justice* (Ottawa: Law Reform Commission of Canada, 1991) at 66 - 67.

community; reduce recidivism; encourage offenders to accept responsibly for their criminal behaviour; and involve offenders in undoing the harm they have done.[132]

Although program design varies from location to location, most programs operate as follows:

- The Crown, in consultation with members of the community, reviews the facts of the case and determines whether the defendant should be given the option of participating in a sentencing circle, rather than having his or her sentence determined by the court. As native councils do not have the power to determine guilt or innocence, only offenders who admit criminal liability are eligible to participate in sentencing circles.
- If the accused agrees to participate, he or she is brought before a council comprised of native elders, teachers, and other members of the community, and the criminal charges are either stayed or withdrawn.
- Council hearings are conducted in private and active victim participation in the hearing is encouraged. The focus of the hearing is not on fixing blame. Instead, the council attempts to make the offender understand the impact of his or her actions on the victim and community. The council may require the offender to complete a number of sanctions including paying a fine, making restitution, or participating in a treatment program. Most councils do not, however, have the power to sentence the offender to a period of incarceration.
- If the offender fails to appear before the council or to complete the prescribed sanction, the Crown is notified and the charges may be reinstated.[133]

The Criminal Justice Review Committee is of the view that:

10.1 Provided that the informed and free consent of both the offender and victim is obtained, victim - offender mediation and community councils may be appropriate means of addressing criminal behaviour in some cases.

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[132]See *e.g.*, Description of the Thunder Bay Aboriginal Community Council Program provided by Mr. Dan Mitchell, Crown Attorney for Thunder Bay. See also: S. Moyer & L. Axon, *An Implementation Evaluation of the Native Community Council Project of the Aboriginal Legal Services of Toronto* (30 April 1993) at 5 - 8. [unpublished]

[133]See *e.g.*, *An Implementation Evaluation of the Native Community Council Project of the Aboriginal Legal Services of Toronto, ibid.* at 8 - 10.

10.2 The provincial Crown Policy Manual should be amended to include formal policies governing the use of alternative measures.

C. Pre-Charge Diversion

Informal diversion from criminal proceedings has always existed in the form of citizens exercising their discretion not to report an offence and through the use of discretion by the police not to lay a charge. Victimization surveys indicate that many offences are not reported to the police and the reason which is most often cited for non-reporting is that the offence was not serious or that the victim and offender resolved the matter themselves. This exercise of discretion recognizes that in certain cases the initiation of criminal proceedings may do more harm than good.[134]

In addition to the informal exercise of the discretion not to lay a charge by victims and the police, at present there are a small number of formal pre-charge diversion programs operating in the province. Pre-charge diversion programs typically operate as follows:

- Upon completion of the investigation, but before charges are laid, the police determine whether the suspect satisfies the program's admissions criteria. In order to be eligible to participate in the Ottawa-Carleton Pre-Charge Diversion Program, for example, the suspect must: not have any previous convictions or outstanding charges; not have previously participated in a diversion program; be accused of a minor, non-violent offence such as shoplifting or mischief; and admit liability for the offence. In addition, the officer must have reasonable and probable grounds to believe that the accused did, in fact, commit the offence in question.
- If the suspect satisfies the admissions criteria, then he or she is afforded the opportunity to consult with counsel and given the option of participating in the diversion program. The suspect is told that if he or she chooses not to participate, the matter will be dealt with by the criminal courts.
- Individuals who choose to participate are referred to an appropriate community agency (*e.g.*: the Salvation Army in Ottawa). After consulting with both the victim and offender, agency staff prescribe an appropriate sanction. Typically, the offender will be required to do one or more of the following: perform a number of hours of community service; make a

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[134]Submission of the John Howard Society dated April 8 1998 at 2.

donation to charity; write a letter of apology to the victim; attend anger management counselling; attend at a cognitive skills workshop; attend financial planning counselling; or make restitution to the victim.

- If the diversion sanction is satisfactorily completed, then no further action is taken against the accused. If the sanction is not completed, then charges may be laid against the offender pursuant to s. 717(4) of the *Criminal Code.*

D. Post-Charge Diversion

At present, there a number of post-charge diversion programs operating in the province. Generally, post-charge diversion programs operate as follows:

- A charge is laid against the accused. The Crown reviews the file to determine whether the defendant satisfies the program's eligibility criteria (which vary from location to location).
- The offender is given the option of participating in diversion and afforded the opportunity to consult with counsel.
- If the offender chooses to participate, the charges are stayed or withdrawn and the offender is told to report to either a probation officer or a case worker (*i.e.* if a community agency is involved) who will prescribe an appropriate sanction.
- Pursuant to s. 717(4) of the *Criminal Code*, if the offender fails to complete the sanction, the charges may be reinstated.[135]

Although most post-charge diversion programs apply only to first-time offenders charged with minor offences, some programs accept repeat offenders and / or defendants who stand accused of more serious offences.

2. THE POTENTIAL ADVANTAGES OF ALTERNATIVE MEASURES

Alternative measures programs not only enhance the efficiency of the criminal courts by ensuring that judicial resources are available to deal with more serious offences, they may also improve the

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[135]In some jurisdictions, the charges are not stayed or withdrawn until such time as the offender has successfully completed the alternative measures program.

quality of the justice system. In many cases, an offender's criminal behaviour can be more rapidly and effectively addressed through a program of alternative measures than through judicial proceedings. Whereas the traditional court system attempts to deter criminal behaviour by punishing offenders, alternative measures endeavour to identify the root causes of an offender's criminal behaviour. There is some evidence to suggest that alternative measures programs are effective in reducing recidivism.[136] In addition, because alternative measures programs encourage restitution, reconciliation, and complainant participation in the justice process, victims report a high level of satisfaction with most alternative measures initiatives.[137]

Effective alternative measures programs also increase public confidence in the criminal justice system. Community involvement in the resolution of less serious, non-violent offences through alternative measures increases offender accountability to the community most directly effected by the anti-social conduct, allows complainants and the offender's family direct involvement in the resolution of the case, and can contribute to an enhanced sense of public safety on the part of the community.

3. THE CURRENT SITUATION IN ONTARIO

Section 717 of the *Criminal Code* and s. 4 of the *Young Offenders Act* authorize provincial Attorneys General to establish alternative measures programs and to institute policies governing their use. In Ontario, a formally designated alternative measures program for young offenders has existed since 1988. The province has also established an alternative measures program for mentally disordered offenders. To date, however, the province has not formally designated a program of alternative measures for adults.

While the government of Ontario has not established an adult alternative measures program for the province, a number of unofficial programs, as well as a small number of formal pilot projects, are

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[136] See *e.g.*, F.W.M. McElrea, "Restorative Justice - The New Zealand Youth Court: A Model for Development in Other Courts?" (1994), 4 J. Judicial Admin. 33.

[137] See *e.g.*, Submission of the Retail Council of Canada in support of the Peel Shoplifting Diversion Program.

operating throughout the province. Most programs are supported locally by Crown Attorneys and the police, and run by charitable organizations or community agencies. There is no central registry of alternative measures programs and no governing body overseeing their operation. Similarly, although the provincial *Crown Policy Manual* contains policies governing both the diversion of mentally disordered offenders and young offenders, there is no adult diversion policy. Not surprisingly, eligibility criteria vary from location to location and program to program.

In our opinion, it is imperative that the government of Ontario establish some kind of coordinated, generally available, and monitored adult alternative measures policy. While we believe there is a need for some degree of uniformity with respect to eligibility criteria and program availability across the province, we are not in favour of mandating a common program design. Instead, local experimentation and community involvement should be encouraged.

In the opinion of the Criminal Justice Review Committee:

10.3 Alternative measures programs have great potential to enhance both the efficiency and quality of the criminal justice process and should be encouraged.

10.4 The government of Ontario should establish an adult diversion policy in order to minimize the appearance of unfairness which may result where:

(a) some parts of the province decide to establish diversion programs and others do not; or

(b) different eligibility criteria apply across the province.

10.5 The adult diversion policy should not mandate a single program model but should instead encourage local experimentation and community involvement.

10.6 The provincial Crown Policy Manual should be amended to require Crown counsel to consider alternatives to prosecution where available.

10.7 Community representatives should be invited to participate in the program design process. Community involvement is critical to ensure that alternative measures programs are not perceived as being "soft on crime" and do not inappropriately "widen the net" of the criminal justice system.

4. CRIMINOLOGICAL RESEARCH

Although a great deal has been written in academic journals about diversion, mediation, community courts, and sentencing circles, the evaluation literature on adult diversion is disappointingly sparse.[138] To date, only a handful of the alternative measures programs operating in the province of Ontario have been formally evaluated. Hence, it is impossible to ascertain which programs:

- are effective in reducing recidivism;
- are effective in reducing total time to charge disposition;
- are cost effective; or
- have a positive impact on the quality of justice in the province.

If the criminal justice system in this province is to be improved, it is important that the government not only continue to introduce (or at least acquiesce to the introduction of) new programs and initiatives, but also that those programs be properly monitored and evaluated.

Recommendations:

10.8 New policies and programs, including alternative measures initiatives, must be carefully planned and properly resourced. Before a project is approved, an agreement should be reached as to when an evaluation will take place and how the project's success is to be measured.

10.9 Pre-charge diversion should continue to be carefully studied by the Ontario Ministry of the Solicitor General and Correctional Services.

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[138] *Solicitor General of Canada,(1998) 3:1 Research Summary: Correction Research and Development,* at 1.

10.10 The government of Ontario should establish a central registry of information on alternative measures programs in the province, and / or a "best practices" manual, which will assist local stakeholders in determining which programs are effective and how they might be adapted to suit local needs and conditions. Consideration should also be given by the government of Ontario to commissioning further independent evaluations of existing programs in order to identify best practices.

CHAPTER ELEVEN:
CO-OPERATION AND CO-ORDINATION

> *The first and, in the Committee's view, most important principle is that of full co-operation and involvement among all of the parties involved in the administration of justice in the search for fair yet efficient procedure.... New procedures cannot be imposed on any one of these groups, but must be designed and implemented in a fully consultative way.*[139]

1. INTRODUCTION

Fairness is the first principle of any justice system. A cornerstone of fairness in the Canadian criminal justice system is the resolute independence of the major participants in the system. The police, the Crown, the defence bar, the judiciary, and the government that funds the system are all independent entities.

From a management perspective, the independence of the major participants in the criminal justice system presents some unique challenges. As the *Martin Committee Report* notes, managing an organization is easiest if all the personnel involved in the organization are accountable to one overseer, with unconstrained managerial authority and a clear vision of what the organization is to accomplish. The major participants in the criminal justice system are not engaged in co-operative and complementary tasks, nor are they accountable to one overseer with unconstrained managerial authority. Unfortunately, this independence is capable of constituting an impediment to achieving an effective and efficient criminal justice system.

The *Report of the Civil Justice Review* described the civil justice system as a "two headed monster", with government responsible for most matters of administration and management, but with the

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[139]Ontario, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Toronto: Queen's Printer, 1993) at 44 - 45 (Chair: Hon: G.A.Martin)[hereinafter *Martin Committee Report*].

judiciary responsible for the important areas of scheduling, assignment of judges and trial co-ordination.[140] The criminal justice system is even more complex. The police are responsible for the investigation of allegations of criminal misconduct and the apprehension of suspected offenders; the prosecution services are responsible for prosecuting accused in the public interest; the private bar and the Ontario Legal Aid Plan share responsibility for advising and representing accused persons; the Court Services Division of the Ministry of the Attorney General is responsible for providing support personnel; the judiciary is responsible for adjudication and important aspects of court management; and responsibility for the custody of those awaiting trial or convicted of offences is shared between provincial and federal correctional officials. Understandably, the public is often left wondering "who's in charge here?".[141]

2. THE MANAGEMENT CHALLENGE

For sound constitutional reasons, each part of the criminal justice system must retain its own identity and independence. It is of crucial importance, however, that the major participants recognize the interdependence of the system. Each of the major participants has the power to take action which will impact upon one or more of the others. For example, a change in Crown charge screening policy will directly affect defence counsel, the trial courts, and probation and parole services. It may also affect police charging practices. A change in police charging practices will directly affect Crown charge screening and all of the other participants in the criminal justice system.

At the present time there is, all too frequently, no prior notification or attempt to co-ordinate initiatives that have system-wide impact. This often results in resources being wasted as one part of the system struggles to deal with new policies or practices of another part, without having an opportunity to provide input or, at least, receive advance warning of the changes. Legislative changes can also have significant impact on the management of the criminal justice system.

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[140]Ontario, *First Report of the Civil Justice Review* (Toronto: Publications Ontario, 1995) at 116 and 119 (Chairs: Hon. R.A. Blair and S. Lang).

[141]*Ibid.* at 110 and 122.

We agree with the conclusion of the *Martin Committee Report* that the principal challenges to the efficient yet fair management of the criminal trial process arise from the combination of the independence of the major participants, their ability to draw on the system's resources without direct accountability, the inherently adversarial nature of the process, and the fact-specific nature of just outcomes. All of these features are, both individually and collectively, impediments to the efficient management of the criminal trial process. The management challenge is to discern how to achieve efficiency without sacrificing the basic principles of justice.

3. PRINCIPLED AND EFFECTIVE CO-OPERATION

The *Martin Committee Report* identified the following five keys to successful management of the criminal trial process:

- full co-operation and involvement among all of the parties involved in the administration of justice;
- willingness on the part of the co-operative participants to change the ways in which they have traditionally carried out their respective function;
- willingness on the part of the participants to take initiatives to properly and fairly resolve cases at an early juncture;
- recognition that charge screening, disclosure, and resolution discussions are all closely interrelated and any reform of pre-trial practices must recognize this fact; and
- willingness to commit financial and human resources to the front end of the process.[142]

We agree that the first and most important principle is that of full co-operation and involvement of all the parties. There are co-operative dependencies among the police, Crown counsel, defence counsel and the judiciary in virtually every aspect of the criminal justice system's practical day-to-day functioning. The independent commitment and active co-operation of each of these groups, none

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[142] *Martin Committee Report, supra* at 44 - 49.

of whom is answerable to any of the others, is essential. Such co-operation and commitment must be maintained through clear and on-going communication and consultation.

It is our view that the maintenance of clear and on-going communication and consultation among the participants in the criminal justice system is best accomplished by means of co-ordinating committees functioning at the provincial and local levels. Experience immediately following the release of the *Martin Committee Report* and during the recent "backlog blitz" has demonstrated the value of regularly scheduled meetings of representatives of the various participants of the criminal justice process. Such meetings foster a spirit of collaboration and co-operation, and of shared responsibility and accountability.

Following the release of the *Martin Committee Report*, a local co-ordinating committee was struck for the Old City Hall Court in Toronto Region. Representatives of the Court, the Ontario Ministry of the Attorney General, the Department of Justice (Canada), and the Ontario Criminal Lawyers' Association agreed on a case management protocol. Reflecting the spirit of the *Martin Committee Report*, the protocol created a structured approach to the screening of charges, the provision of disclosure to the defence, and the early resolution of cases. A Practice Direction implementing the protocol was issued for the Old City Hall Provincial Division Court in Toronto on October 4, 1993. As a result of this consultative and co-operative process, intake and pretrial courts were created to supervise and monitor the front-end processing of all charges. We have been advised that, unfortunately, this committee is no longer in operation.

The value of local co-ordinating committees was also demonstrated during the recent "backlog blitz" initiative. In the target court locations, regular consultation takes place between local judges, trial coordinators, court administrative staff, Crown counsel, police, legal aid and the defence bar. By gathering together representatives of the major participants in the local criminal justice system, a large number of the factors which contribute to the backlog can be addressed. These local co-ordinating committees are able to tackle prisoner transportation and escort issues, consider and

implement innovative proposals for re-engineering Crown and court processes, and significantly improve early resolution and "time to trial" rates.[143]

In our opinion, judicial commitment and leadership are crucial to the success of these co-ordinating committees. Judges set the tone for all who work in the courts. They brought to the backlog blitz initiative a unique perspective and moral authority derived from their constitutionally guaranteed independence and impartiality.

We believe the administration of criminal justice in Ontario would benefit significantly from the establishment of local criminal justice co-ordinating committees throughout the province. Reporting to a provincial co-ordinating committee, these committees could play an important role in the province-wide development and maintenance of orderly, predictable, and effective caseflow management systems which are responsive to local needs and conditions.

4. A PROVINCIAL CRIMINAL JUSTICE CO-ORDINATING COMMITTEE

We are of the view that greater efficiency in the criminal justice system can be achieved by creating a provincial criminal justice co-ordinating committee [hereinafter the "PCJCC"]. The mandate of the PCJCC would be to identify and address issues and problems in the criminal justice system at the province-wide level.

The PCJCC would carry out its mandate by:

- serving as a forum in which criminal justice stakeholders could consult and communicate with one another, identify problems, and debate and possibly implement solutions;

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[143]The backlog blitz was implemented in six of Ontario's busiest Provincial Division locations (Newmarket, Barrie, Etobicoke, North York, Scarborough and Brampton). As of October 31, 1998, the number of charges in progress in the six locations was reduced by 27.2% from November of 1996. This resulted in the number of charges that were more than eight months old dropping by approximately 40% (Ontario Ministry of the Attorney General Statistical Backlog Report, December 1, 1998, and Ontario Ministry of the Attorney General Age of Pending Report for the month of August 1998, dated October 5, 1998).

- providing a mechanism whereby participants can raise issues of concern to all participants in the system;
- providing a means of communicating proposed policy and procedural changes to other stakeholders so that their input can be obtained before the change is implemented; and
- reporting periodically to the Joint Heads of Court And Attorney General Committee (the Chief Justice of Ontario, the Associate Chief Justice of Ontario, the Chief Justice of the Ontario Court of Justice, the Associate Chief Justice of the Ontario Court of Justice, the Chief Judge of the Ontario Court (Provincial Division), the Associate Chief Judge of the Ontario Court (Provincial Division), the Attorney General of Ontario, and the Deputy Attorney General).

It is our view that the following organizations / individuals should participate in the work of the PCJCC: the judiciary; the Ontario Ministry of the Attorney General; the Department of Justice (Canada); the Ontario Ministry of the Solicitor General and Correctional Services and perhaps some police forces, including the RCMP; Probation and Parole Services; the Correctional Service of Canada; the Ontario Criminal Lawyers Association; the Ontario Crown Attorneys' Association; the Victim-Witness Assistance Program; and the Ontario Legal Aid Plan. In addition, committee members could invite other stakeholders to participate either permanently or on an *ad hoc* basis.

We understand that, at present, there is no province-wide mechanism for formal, regular contact and communication amongst all participants in the criminal justice system. Accordingly, in our view it is imperative that a PCJCC be established in the immediate future.

The Criminal Justice Review Committee recommends that:

11.1 The Joint Heads of Court and Attorney General Committee establish a permanent provincial criminal justice co-ordinating committee ("PCJCC") composed of representatives of key participants in the criminal justice system. The mandate of the PCJCC would be to act as a forum where participants could:

(a) bring problems and issues of concern to the attention of other participants;

(b) engage in consultation and co-ordination;

(c) discuss solutions to problems with other participants;

(d) obtain the views of other participants with regard to possible changes in policy; and

(e) notify other participants of changes in policy.

11.2 The participants in the PCJCC be the following:

(a) the Chief Justice of the Ontario Court (General Division);

(b) the Chief Judge of the Ontario Court (Provincial Division);

(c) the Ontario Ministry of the Attorney General;

(d) the Ontario Ministry of the Solicitor General and Correctional Services, including representatives of the OPP, RCMP and municipal police forces;

(e) the Department of Justice (Canada);

(f) the Ontario Criminal Lawyers' Association;

(g) the Ontario Crown Attorneys' Association;

(h) the Ontario Legal Aid Plan;

(i) Probation and Parole Services, and the Correctional Service of Canada;

(j) the Victim-Witness Assistance Program; and

(k) such other participants as the PCJCC sees fit, including *ad hoc* public participants.

11.3 That the representatives of each participant in the PCJCC be senior persons with authority to discuss and resolve issues on behalf of their institutions or organizations.

11.4 That the PCJCC meet on a regular basis and report to the Joint Heads of Court and Attorney General Committee as required.

5. LOCAL CRIMINAL JUSTICE CO-ORDINATING COMMITTEES

Many of the problems in the criminal justice system are local problems. While the cost of individual local problems, viewed in isolation, may appear marginal, the cumulative cost to the criminal justice system is considerable. For example, if one locality has a problem with prisoner transport that does not exist in other localities, then the system as a whole will probably not identify prisoner transport as a problem. Large numbers of these small problems can amount to a tremendous amount of waste.

Local problems may well have local solutions. We note, however, that the same lack of co-ordination and communication that exists at the provincial level often also exists at the local level. We are therefore of the view that a criminal justice co-ordinating committee should be established for each locality ("LCJCC"). As a general rule, there should be one LCJCC for each court location in the province. However, in some judicial districts it may make sense to have several committees and in other regions it may be advisable to have only one committee serving several court locations. We envision that the mandate and method of each LCJCC will mirror that of the PCJCC, with such local modifications as may be necessary.

The Criminal Justice Review Committee recommends that:

11.5 Each court location establish a local criminal justice co-ordinating committee ("LCJCC") chaired by the judiciary and composed of representatives of key participants in the criminal justice system at the local level. The mandate of the LCJCC would be to act as a forum where participants could:

(a) bring problems and issues of local concern to the attention of other participants;

(b) engage in consultation and co-ordination;

(c) discuss solutions to problems with other participants;

(d) obtain the views of other participants with regard to possible changes in policy; and

(e) notify other participants of changes in policy.

11.6 The participants in each LCJCC be the following persons, or their representative:

(a) the local administrative justice of the Ontario Court (General Division);

(b) the local administrative judge of the Ontario Court (Provincial Division);

(c) the local administrative justice of the peace;

(d) the local Crown Attorney;

(e) a senior representative from each policing service that uses court facilities in the area, as well as the Superintendent (or his or her designate) of each local jail;

(f) the local agent of the Department of Justice (Canada) if there is no permanent federal Crown office;

(g) a representative from either the Ontario Criminal Lawyers' Association or the county / district law association;

(h) the local manager of court operations;

(i) the local office of the Ontario Legal Aid Plan;

(j) the local office of Probation and Parole Services, and possibly the Correctional Service of Canada;

(k) the Victim-Witness Assistance Program; and

(l) such other participants as the LCJCC sees fit, including *ad hoc* public participants.

11.7 If a representative attends on behalf of an official, (*e.g.*, an officer attends on behalf of the Chief of Police) then the representative should be a senior official with decision-making authority.

11.8 That each LCJCC meet on a regular basis.

6. FEDERAL-PROVINCIAL CO-OPERATION

A. Delegation of Charges

The Attorney General of Ontario is responsible for prosecuting offences contrary to the *Criminal Code*. The Attorney General of Canada is responsible for prosecuting offences contrary to other federal criminal legislation. Their separate jurisdictions are found in subsection 2(2) of the *Criminal Code*, which defines "Attorney General" as follows:

(a) with respect to proceedings to which this Act applies, means the Attorney General or Solicitor General of the province in which those proceedings are taken and includes his lawful deputy, and

(b) with respect to

i. the Yukon Territory, the Northwest Territories, and Nunavut, or

ii. proceedings commenced at the instance of the Government of Canada and conducted by or on behalf of that Government in respect of a contravention of, a conspiracy or attempt to contravene or counselling the contravention of any Act of Parliament other than this Act or any regulation made under any such act, means the Attorney General of Canada and includes includes his lawful deputy.[144]

Criminal activity, by its very nature, does not differentiate between jurisdictions. Offenders may commit a number of *Criminal Code* and non-*Criminal Code* offences as part of one criminal enterprise. For example, accused drug traffickers are often arrested carrying prohibited or restricted weapons, and frequently resist arrest. Impaired drivers are often found in possession of illegal drugs when they are arrested. This cross-over activity can mean that two trials are held, where only one is legally required. There is no doubt, for example, that an armed drug trafficker should be prosecuted only once, since the gun is an integral part of the drug crime. This is a matter not only of economy of resources, but of basic fairness as well.

The prosecution of charges can be, and often is, delegated from one Attorney General to the other; however, there is no over-arching policy for the whole province. We are of the view that there should be a protocol negotiated by representatives of the Ontario Ministry of the Attorney General and the Department of Justice (Canada) to deal with the delegation of criminal charges. While we will suggest some basic principles that should guide the negotiations, we recognize that the protocol will have to be worked out between the two levels of government. Resource considerations will be at the heart of the negotiations; however, we are also of the view that it is in everyone's best interests that cases be prosecuted smoothly and efficiently, with an eye to reducing the number and length of proceedings.

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[144] *Criminal Code*, R.S.C. 1985, c. C-46, s. 2(2).

The basic principle which should guide the drafting of the protocol is simply this: where *Criminal Code* and non-*Criminal Code* charges are part of the same or a closely related criminal transaction, the Attorney General prosecuting the more serious charge should take carriage of the less serious charge. Where both charges are equally serious, but one offence is committed in order to facilitate the commission of the other, then the facilitating charge should be delegated.

Consider, for example, the arrest and prosecution of an armed drug trafficker. While reasonable people may disagree as to whether possession of an illegal firearm or drug trafficking is the more serious charge, most people would agree that drug traffickers carry guns to facilitate their drug crimes. They do not carry drugs to facilitate their gun crimes. Accordingly, responsibility for prosecuting the firearms charge should be delegated to the federal Crown.

Some difficult questions arise where an accused is charged with fail to appear, breach of probation, or breach of a bail order that is related to a federally-prosecuted charge. We are of the view that these charges should be prosecuted by agents of the Attorney General of Ontario, since these criminal transactions involve the administration of justice and, as such, are separate and distinct from the underlying federal offence.

The Criminal Justice Review Committee recommends that:

11.9 The Department of Justice (Canada) and the Ontario Ministry of the Attorney General negotiate a protocol to govern the delegation of charges between their agents where persons are charged with offences contrary to the *Criminal Code* and offences contrary to other federal criminal legislation, and those charges arise out of the same criminal transactions or related criminal transactions.

11.10 The basic principles of the protocol should be as follows:

(a) the jurisdiction which prosecutes the more serious charge should assume carriage of the less serious charge;

(b) where both charges are equally serious, but one offence is committed in order to facilitate the commission of the other, then the facilitating charge should be delegated;

(c) where a *Criminal Code* charge is laid relating to a breach of a probation or bail order, or a failure to appear in court, that arises from a non-*Criminal Code* charge, that charge should continue to be prosecuted by agents of the Attorney General of Ontario;

(d) where there is no obvious delegation, then the issue should be left to the discretion of the local agent of the respective Attorneys General; and

(e) the local agents of the respective Attorneys General should retain discretion to accept or reject individual delegations.

We note that a protocol need not be the only solution in every case, and encourage a creative approach to prosecutions. For example, certain very serious cases may contain important *Criminal Code* and non-*Criminal Code* charges. Many sophisticated criminals are not only in the drug business, but are also involved in other criminal enterprises as well. Sometimes police investigations uncover more than one type of serious criminal activity. Such cases may require more than one prosecutor. In those instances, it may make sense to consider assembling a prosecution team consisting of counsel from both the local Crown Attorney's office (or the Crown Law Office-Criminal) and the Department of Justice (Canada).

The Criminal Justice Review Committee recommends that:

11.11 The Ministry of the Attorney General and the Department of Justice consider assigning prosecutors jointly to very serious cases where the alleged criminal behaviour results in both *Criminal Code* and non-*Criminal Code* charges.

7. COURT SERVICES AGENCY

The *Report of the Civil Justice Review* concluded that:

> ...the justice system can no longer function effectively in Ontario unless and until a single authority, with clear lines of responsibility and accountability, is established to deal with all administrative, financial and budgetary, and operation matters relating to court administration in the Province.[145]

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[145] *Civil Justice Review Report, supra* at 14.

The idea of establishing a unified administration, management, and budgetary model for Ontario's court system (a "Court Services Agency") is currently being reviewed by the Joint Heads of Court and Attorney General Committee. We share the opinion of the Civil Justice Review Committee that the idea of establishing a Court Services Agency in Ontario warrants careful consideration.

8. SPECIALIZED COURTS

Criminal courts have not traditionally specialised in any particular type of crime, victim, or accused. In recent years, however, there has been a trend towards the creation of specialised courts and / or teams of prosecutors. Some of these courts concentrate on specialized aspects of the pre-trial process, others are specialized trial courts.

Canada's first consolidated mental health court, which began operation in 102 Court at Old City Hall in Toronto on May 11, 1998, is an example of how specialized courts can improve the delivery of justice services. This court provides a centralized facility for mentally disordered persons who come in contact with the criminal justice system. It has psychiatrists on site who provide quick assessments to determine an accused's fitness for trial. Other on-site mental health workers screen accused and arrange for diversion where appropriate. This co-ordinated approach expedites the movement of disordered accused to treatment facilities and services, rather than holding them unnecessarily in detention centers. It provides speedy, humane care for accused persons suffering from mental disorders and developmental disabilities, helping them receive appropriate treatment, and reducing the likelihood of offenders committing new crimes.[146]

The Toronto Drug Court pilot project is another example of a new specialized court. The "Drug Court" is a court specifically designated to administer cases referred for judicially supervised drug treatment and rehabilitation. Non-violent offenders who are charged with offences involving small quantities of crack cocaine or heroin are given the option of entering a drug treatment program,

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[146]The Ontario Review Board is also using 102 Court for its initial disposition hearings and annual hearings for community release clients. This facilitates the attendance of prosecutors at the hearing to represent the public interest.

providing they meet certain eligibility criteria and are found to be drug dependent. Upon successful completion of the program the outstanding charges are stayed or a non-custodial sentence is imposed. Failure to finish the program may result in the offender being sentenced or returned to the regular court process. The goal of the Drug Court is to make individuals who are drug dependent productive and law abiding members of society. By reducing the flow of such people into the criminal justice system, substantial cost savings to the taxpayer will be realized.

In a number of locations across the province there are also pilot projects for the specialized prosecution of cases involving domestic violence and child victims. These court locations often have specialized staff (*e.g.,* victim/witness assistance workers) and the prosecutors receive specialized training. It may be that carefully developed specialized courts have the potential to improve the quality of justice, while at the same time saving resources. Specialized courts may be able to deal more sensitively with complainants and, because prosecutors develop expertise in the subject area, to process cases more expeditiously and with fewer adjournments.

The Criminal Justice Review Committee recommends that:

11.12 Specialized courts be considered where it can be shown that they are likely to either:

(a) improve the quality of justice; or

(b) result in cost savings without compromising the quality of justice.

9. CO-OPERATION WITH COMMUNITY ORGANIZATIONS

Lawyers, judges, police officers, and accused persons are not the only people with a role to play in the criminal justice system. The public at large also has a major stake in the system. Moreover, there are organizations in the community that have an important role to play, including victims' rights or advocacy organizations; charitable organizations; and organizations designed to assist offenders. There is no doubt that participants in the criminal justice system can benefit from the views and experiences of these organizations. Accordingly, we encourage broad consultation with other "stakeholders" in the system who may not play a direct role in the administration of justice, but who nevertheless make a valuable contribution to the justice system. Indeed, it is our experience that

many of these organizations would like to play a greater role in the criminal justice system, in the sense that they wish to be consulted on an ongoing basis by the direct participants in the system. We are of the view that such consultation could take place within the context of the provincial criminal justice co-ordinating committee, and the local criminal justice co-ordinating committees, on an *ad hoc* basis as those committees consider appropriate.

The Criminal Justice Review Committee recommends that:

11.13 Participants in the criminal justice system consult broadly, on an ongoing basis, with other stakeholders in the system. This consultation could take place within the context of the provincial criminal justice co-ordinating committee, or the local criminal justice co-ordinating committees.

CHAPTER TWELVE: SUMMARY OF RECOMMENDATIONS

The Criminal Justice Review Committee makes the following recommendations:

CHAPTER ONE: INTRODUCTION

1.1 Adequate and predictable resources be provided to the courts, the Ontario Legal Aid Plan, and the prosecution services.

1.2 The Integrated Justice Project develop a system which is capable, amongst other things, of generating reliable statistical information regarding the operation of the criminal courts in the province. Ideally, the new system will:

- be simple to use;
- be capable of generating statistical information on both a per charge and per case basis;
- be capable of automatically compiling statistical information (e.g. without requiring that the data be manually inputted into a separate statistical database); and
- service both divisions of the Ontario Court of Justice as well as the Ontario Court of Appeal.

It would be useful if the system was:

- capable of maintaining a record of cases which were adjourned because they were not reached or because there was no court space available (this information could be used to identify overburdened courts);
- able to sort information by offence category (e.g. sexual assaults, domestic assaults, impaired driving offences);
- capable of identifying the next available trial date in both Provincial and General Division in each court location. This would allow judicial pre-trials in General Division to be scheduled at the time of committal in Provincial Division, thus obviating the need for a set date appearance in General Division; and

- able to identify and track appellate cases (both summary conviction and indictable) which raise common legal issues (this information could then be used to consolidate similar cases and to identify test cases).

1.3 The proposed provincial criminal justice coordinating committee and the proposed local criminal justice coordinating committees consider ways of enhancing the dignity of court proceedings.

CHAPTER TWO: BAIL

2.1 The Ontario Ministry of the Solicitor General and Correctional Services examine the exercise of police pre-trial release powers across the province to determine whether greater use could be made of the release powers conferred on the police by the *Criminal Code*.

2.2 The Ontario Ministry of the Solicitor General and Correctional Services report the results of the above study to the proposed provincial criminal justice co-ordinating committee for whatever further action that committee considers appropriate.

2.3 The proposed local criminal justice co-ordinating committees review the operation of local bail courts and implement whatever measures are required to expedite the appearance of all detained persons for a bail hearing as soon as possible.

2.4 The Ontario Ministry of the Attorney General and the Chief Judge of the Ontario Court (Provincial Division) consider establishing additional bail courts in busy jurisdictions.

2.5 Duty counsel continue to assist unrepresented accused at bail hearings.

2.6 In busy court locations, in accordance with the recommendations of the *Cole / Gittens Commission Report*, articling students or non-lawyers should be available to assist duty counsel to prepare for bail hearings. These "bail interview officers" could perform such tasks as: determining which accused wish to be represented by duty counsel at the bail hearing; conducting a preliminary interview of the accused, possibly at the jail or police station; and contacting potential sureties. The role of non-lawyers should, however, be limited to the provision of clerical and administrative support. Bail interview officers must not offer legal advice or opinions.

2.7 At least two duty counsel be assigned to each bail court in busy court locations.

2.8 At least two Crown counsel be assigned to each bail court in busy court locations. One Crown could call the list while the other meets with defence counsel, complainant / victims, or police in an adjacent area. Where feasible, Crown counsel should be available to meet with defence counsel prior to the commencement of bail court.

2.9 Whenever possible, Crown counsel be assigned to bail court for intervals of at least one full week's duration.

2.10 Adequate court staff be assigned to busy bail courts to ensure that efficient and streamlined case processing occurs.

2.11 The proposed local criminal justice co-ordinating committees meet regularly to discuss prisoner transportation and bail court problems and procedures.

2.12 Bail courts be provided with computers equipped with suitable word processing programs and templates to assist court staff in preparing bail orders and related documents. Court staff should be given such training in the use of this equipment as they may require.

2.13 The government of Ontario continue to fund bail supervision or equivalent programs.

CHAPTER THREE: CROWN CHARGE SCREENING

3.1 The Ontario Ministry of the Attorney General and the Department of Justice (Canada) allocate appropriate and sufficient professional and support staff resources to the charge screening function so that experienced Crown counsel have the time required to conduct proper charge screening reviews.

3.2 The Ontario Ministry of the Attorney General and the Department of Justice (Canada) examine ways to foster work environments where prosecutors feel free to fearlessly exercise discretion on a principled basis, without concern for personal or professional repercussions. We endorse the recommendation of Commissioner Kaufman that the Ministry of the Attorney General take measures, including but not limited to further education and training of Crown counsel and their supervisors, to ensure strong institutional support for the exercise of such discretion.

3.3 An adequate number of duty counsel be available to assist unrepresented accused in ascertaining the Crown's tentative position on sentence and to provide basic legal advice on the consequences of entering a guilty plea to unrepresented accused.

CHAPTER FOUR: LEGAL AID

4.1 The police provide to all accused persons, at the time of arrest or the issuing of an appearance notice, summons, or other form of statutory release, a brochure, prepared by Ontario Legal Aid, which:

- provides an overview of the criminal justice process, including information regarding the availability and role of duty counsel;
- explains the legal aid application process;
- includes a list of the documents which Ontario Legal Aid Plan typically requires;
- contains information on the lawyer referral system operated by the Law Society of Upper Canada, as well as a list of any student or community legal clinics operating in the area where the reader might obtain advice regarding a criminal matter;
- indicates that if the accused wishes to apply for legal aid or retain private counsel, this should be done as soon as possible and, in the absence of exceptional circumstances, within three weeks of the date upon which charges were laid;
- advises the accused that he or she has the right to ascertain the Crown's position on sentence in the event of an early guilty plea and explains how the accused can obtain this information (i.e. through a privately retained lawyer or duty counsel);
- explains how, where, and when the accused can obtain disclosure; and
- includes anticipated time lines for dealing with the matter.

4.2 If the efficiency of legal aid approval process is to be improved, more must be done to discourage unrealistic applications. To this end, the Criminal Justice Review Committee recommends that the Ontario Legal Aid Plan consider:

- including a "self-test" in the proposed brochures which are to be prepared by the Ontario Legal Aid Plan and provided to all accused persons; and
- empowering intake officers to provide summary refusals where, because of the accused's financial circumstances, the nature of the offence and/or the accused's criminal record, there is no risk of incarceration and there are no other "exceptional circumstances" which would justify extending coverage to the accused.

4.3 The Ontario Legal Aid Plan be empowered to issue discretionary certificates in situations where, notwithstanding the fact that there is little or no risk of incarceration, the consequences of a criminal conviction on the accused would likely be so severe that, in the interests of justice, coverage should be provided.

4.4 An adequate number of duty counsel be available in each court location to assist accused persons during the crucial pre-trial stages of the criminal justice process.

4.5 All accused persons who have not retained private counsel should be permitted to consult with duty counsel during bail and set date or intake court proceedings, regardless of the accused's financial circumstances.

4.6 Duty counsel services should be provided by lawyers experienced and knowledgeable in the criminal law.

4.7 Efforts be made to ensure continuity of duty counsel in each court location. In court locations where bail hearings and set date proceedings are conducted daily, this may be accomplished by assigning the same duty counsel to bail / set date court for a period of one week or longer. In other areas where, for example, set date court is held every Monday, this may be accomplished by scheduling duty counsel for four consecutive Mondays or all Mondays in the month of July, etc.

4.8 The Criminal Justice Review Committee endorses the use of case management by Ontario Legal Aid Plan and supports its extension to preliminary inquiries, cases involving smaller projected billings, and cases involving multiple accused.

4.9 The Ontario Legal Aid Plan study the feasibility of issuing task-specific certificates.

CHAPTER FIVE: CROWN DISCLOSURE

5.1 Full and timely Crown disclosure is an essential component of an efficient criminal justice system. To ensure that efficient disclosure practices are instituted and maintained across the province, police and prosecution cooperation and coordination must improve. The Criminal Justice Review Committee recommends that the Attorney General and Solicitor General of Ontario, in co-ordination with federal policing and prosecution authorities, establish a permanent disclosure co-ordinating committee to:

(a) develop a joint directive or standing order comprehensively setting out the disclosure responsibilities of the police and prosecutors, to be issued by the Solicitor General and the Attorney General of Ontario and relevant federal authorities; and

(b) examine, on an ongoing basis, disclosure issues and to make recommendations as to how these issues might best be resolved.

5.2 A new and effective Memorandum of Understanding be negotiated between police representatives and the Ministry of the Attorney General as soon as possible. The proposed Ontario Attorney General and Solicitor General's co-ordinating committee on Crown disclosure should monitor the progress of discussions between the police and the Ministry of the Attorney General and determine a reasonable time frame for the development and implementation of uniform and consistent disclosure practices in Ontario.

5.3 The proposed Ontario Attorney General and Solicitor General's coordinating committee on Crown disclosure should report on a regular basis to the proposed provincial criminal justice co-ordinating committee.

The Memorandum of Understanding between the Ontario Ministry of the Attorney General and the Ontario Association of Chiefs of Police should incorporate the following principles:

Timing

5.4 In the absence of exceptional circumstances, disclosure should be provided to an accused at his or her first court appearance.

Production

5.5 Two copies of the disclosure materials should be prepared by the police at the outset - one for the Crown and one for the defence. In cases involving multiple accused, the police should prepare one copy of the disclosure materials for each accused.

Accountability

5.6 Every police force in the province should be required to designate an appropriate number of disclosure officers, who will be responsible for reviewing all police briefs to determine whether the briefs: (a) are complete; and (b) comply with quality control standards.

5.7 Only briefs which are approved by a disclosure officer should be forwarded to the Crown. All other briefs should be remitted back to the investigating officer with an indication of what improvements / additional materials are required.

5.8 Disclosure officers should be of high rank and should be empowered to take appropriate action when officers fail to make full and timely disclosure to the Crown or to respond to Crown requests for additional materials or investigative work, in a prompt and courteous manner.

Quality Control

5.9 Uniform quality control standards be implemented across the province. At a minimum, those standards should stipulate that all police briefs must:

(a) be paginated;
(b) include an index; and
(c) contain a meaningful synopsis of the case. The synopsis should include a list of police and civilian witnesses and a summary of each witness's anticipated evidence which clearly articulates the significance of that evidence.

Completeness

5.10 Checklists should be used to monitor the timing and content of disclosure. All disclosure should be dated and the brief flagged so that the Crown is aware when additional disclosure has been added to the brief after the accused's first court appearance.

Cost

5.11 The accused is entitled without fee to basic disclosure as defined in the *Martin Committee Report*.

5.12 Each accused is entitled to *one* copy of the basic disclosure materials. Accordingly, where an accused requests an additional copy or copies (*e.g.* because the original materials have been lost), the accused may be charged a reasonable fee for this service.

5.13 That police basic and in-service training programs continue to stress the importance of effective and efficient witness interviews and how audio and video taping can enhance rather than hinder the statement taking process.

5.14 The proposed Crown disclosure co-ordinating committee develop, on a priority basis, a comprehensive, province-wide policy on the disclosure of audio and video taped evidence for consideration and implementation by the proposed provincial criminal justice co-ordinating committee.

5.15 In the absence of a comprehensive, province-wide policy on the transcription of witness statements, the issue of whether the Crown will be required to produce a transcript of a recorded statement, or portions thereof, should be resolved, if possible, by agreement between counsel prior to or at a judicial pre-trial conference sought well in advance of the trial date.

5.16 The proposed permanen disclosure co-ordinating committee should develop a comprehensive, province-wide policy on the transcription of witness statements for consideration by the proposed provincial criminal justice co-ordinating committee.

CHAPTER SIX: RESOLUTION DISCUSSIONS

6.1 Policy R-1 of the provincial *Crown Policy Manual* be amended to include guidelines, similar to those contained in the plea and sentence negotiation chapter of the federal prosecutor's manual, governing the conduct of resolution discussions with unrepresented accused.

6.2 In accordance with recommendation 55 of the *Martin Committee Report*, that trial judges conduct succinct, plain language plea comprehension inquiries in all cases where a guilty plea is entered.

6.3 In accordance with recommendation 56 of the *Martin Committee Report*, that the *Criminal Code* be amended to require a sentencing judge to conduct a plea comprehension inquiry in all cases where a guilty plea is entered, regardless of whether the accused is represented by counsel.

6.4 The Ministry of the Attorney General continue to support the Investment Strategy initiative.

6.5 Wherever possible, Crown briefs be stored in, or in close proximity to, the Crown Attorney's office.

6.6 The local trial coordinator, in cooperation with the Crown Attorney and the judiciary, endeavour to ensure that individuals who wish to enter a plea of guilty can do so without delay.

6.7 Crown counsel emphasize in sentencing submissions the principle that, absent exceptional circumstances, there should be less mitigation for a guilty plea entered on the day of trial than for a guilty plea entered in advance of trial.

6.8 The Ministry of the Attorney General and the federal Department of Justice circulate to Crown counsel a list of early resolution "best practices".

6.9 The Law Society of Upper Canada amend Rule 10 of its *Professional Conduct Handbook* to reflect the professional duty of lawyers, when acting as advocates, to make every reasonable effort consistent with the legitimate interests of the client to expedite litigation.

6.10 The Criminal Justice Review Committee endorses recommendation 58 of the *Martin Committee Report* which provides that a sentencing judge should not depart from a joint submission unless the proposed sentence would bring the administration of justice into disrepute, or is otherwise not in the public interest.

CHAPTER SEVEN: JUDICIAL PRE-HEARING CONFERENCES

7.1 The Criminal Justice Review Committee recognizes that there is no single system for the scheduling and conducting of pre-hearing conferences suited to all court locations in the province. To date, each location has developed its own system for conducting judicial pre-hearing conferences and, in the opinion of the Committee, it is desirable that each location continue to experiment with, and refine, its own system to suit local conditions.

7.2 A Commentary to Rule 10 of the *Professional Conduct Handbook* be added concerning the role of defence counsel at a judicial pre-hearing conference. The commentary should state that defence counsel are to conduct the defence of their clients as they see fit, within the limits of the law, ethics, and reasonable skill and prudence, subject to the following exceptions, where the client's informed instructions are mandatory:

- the client's plea;
- the client's election as to mode of trial, where the accused has an election; and
- the decision to testify.

7.3 The proposed local criminal justice co-ordinating committees consider adopting the following "best practices":

(a) No judicial pre-hearing conference should be held until a resolution meeting (either by telephone or in person) has been held between counsel. Telephone counsel conference meetings should be encouraged wherever possible, bearing in mind that it is never acceptable for a secretary or other support staff to telephone in the place of counsel;

(b) No judicial pre-hearing conference should be held until the Crown has made initial disclosure;

(c) Where possible, judicial pre-hearing conferences should be scheduled on a remand date. This will ensure that, if necessary, defence counsel is able to confer with his or her client without delay;

(d) A duty court or judge should be made available whenever judicial pre-hearing conferences are scheduled;

(e) At the request of either Crown or defence counsel, the investigating officer should be available for consultation or, if permitted by the judge, should attend the judicial pre-hearing conference;

(f) Where defence counsel feel it is desirable for the investigating officer to be available to attend the judicial pre-hearing conference, or be available to answer questions, he or she should communicate this to the Crown at the counsel pre-trial;

(g) Where defence counsel is going to present information or evidence to Crown counsel for the Crown's consideration, and it can be reasonably anticipated that the Crown will be required to make additional inquiries as a result of that information, defence counsel should do so at the counsel pre-trial so that the judicial pre-trial need not be adjourned.

7.4 A judicial pre-hearing conference be mandatory where it is anticipated that a matter will involve a half-day or more of court time or where it is requested by either the crown or defence.

7.5 To the extent that the recommendations of the Martin Committee with regard to judicial pre-hearing conferences have not been implemented, the Criminal Justice Review Committee recommends that the Attorney General of Ontario take immediate steps to implement the recommendations. Specifically, Crown counsel attending at a judicial pre-hearing conference must be experienced and must have full authority to deal conclusively with issue resolution and guilty plea negotiations

7.6 Defence counsel attending at a judicial pre-hearing conference should attend with complete instructions and have full authority to deal conclusively with the matter.

7.7 At a minimum, the following issues should be addressed at every pre-hearing conference:

(a) whether counsel wish to raise any issues with respect to disclosure;

(b) whether the continuity of the physical or documentary evidence can be waived, waived except for certain specific exhibits or documents, or dealt with by way of admission or affidavit evidence;

(c) whether affidavits pursuant to ss. 29 and 30 of the *Canada Evidence Act* with regard to business records or records of financial institutions can be waived;

(d) whether there are witnesses who can be waived or whose evidence can be agreed to;

(e) where a preliminary inquiry is to be held, whether an out of court discovery is appropriate for any or all witnesses;

(f) whether written submissions on legal or evidentiary issues can be provided to the presiding judge, in place of oral argument.

7.8 The Criminal Justice Review Committee recognizes that the judiciary in Ontario is highly qualified and able, but that not every judge may be suited to or interested in conducting judicial pre-hearing conferences. Administrative judges should give careful consideration to the selection of judges conducting pre-hearing conferences. Judges conducting pre-hearing conferences should be experienced in criminal law, knowledgeable with regard to the range of penalty for offences, and be able to facilitate the resolution of issues.

CHAPTER EIGHT: CRIMINAL COURT CASEFLOW MANAGEMENT

8.1 That the proposed provincial criminal justice coordinating committee and the proposed local criminal justice coordination committees facilitate effective caseflow management throughout the province.

8.2 The Criminal Justice Review Committee recognizes that there is no single caseflow management system suited to all locations in the province. Caseflow management systems should be developed locally to accommodate local needs, conditions and available judicial and other resources. While final responsibility for the operation of the system lies with the courts, all justice partners must be active participants in the development and evaluation of the system.

8.3 The Criminal Justice Review Committee has concluded that the judicial commitment and leadership are critical components of an effective caseflow management system.The judiciary should be encouraged to play an active role in determining the timetable which will govern proceedings and must be diligent in enforcing compliance with those deadlines.

In order to ensure that all accused persons in Ontario are tried within a reasonable time, it is imperative that province-wide standards be adopted to govern the completion of the intermediate steps in the trial process. Court appearances should only be scheduled where legally necessary. As a general rule, the number of pre-trial appearances, exclusive of any bail hearing, judicial pre-trial conference or preliminary inquiry, should be limited to three.

In the opinion of the Criminal Justice Review Committee the following guidelines are appropriate and should be adopted throughout the province:

8.4 Unless special circumstances exist, within four weeks of charges being laid, the police should provide the Crown with two copies of a high quality Crown brief. In prosecutions involving more than one accused, the police should provide the Crown with one copy of the brief for each accused, plus one copy for the Crown.

8.5 Prior to the accused's first appearance, an experienced Crown counsel should review the brief and determine what materials should be disclosed. Experienced Crown counsel should also screen the charges.

8.6 The first appearance should be scheduled so as to allow adequate time for: the accused to apply for legal aid or retain private counsel; the police to provide the Crown with two copies of a high quality brief; and the Crown to screen the charges. In the case of an out- of-custody accused, it is recommended that the first appearance be scheduled no later than six weeks from the date upon which the appearance notice or summons was issued.

8.7 Where local conditions allow, appearances in intake court should be staggered so as to prevent courtroom overcrowding and to ensure that accused persons do not have to spend hours in court, waiting for their cases to be called.

8.8 At the time of the accused's first appearance, the Crown should:

- withdraw any charges which fail to satisfy the reasonable prospect of conviction / public interest test set out in the Martin Committee Report and the Crown Policy Manual;
- where appropriate, refer the accused to a program of alternative measures;
- in the case of a hybrid offence, providing that the police investigation has been completed, indicate whether the Crown will be proceeding summarily or by indictment; and
- provide a copy of the disclosure package to the accused or his or her counsel. Accused persons should be advised that if the disclosure materials are lost or stolen, there will be a charge for replacement copies.

8.9 Efficiency is enhanced if two Crown counsel and two duty counsel are assigned to busy intake courts. While one Crown and one duty counsel deal with matters in court, the other two can conduct resolution discussions outside of court.

8.10 If the accused is unrepresented but has a *bona fide* excuse for his or her failure to obtain legal representation, the second appearance should be scheduled approximately four to six weeks from the date of the first appearance so as to afford the accused additional time to apply for legal aid or retain private counsel. Otherwise, the adjournment between the first and second appearances should be brief.

8.11 Accused persons who intend to be represented should appear with counsel at their second appearance and counsel should "get on the record". If they have not already done so, the Crown and defence should meet to discuss the possibility of a plea or to narrow the issues for trial. This meeting should be conducted prior to the accused's third court appearance.

8.12 At the outset of the accused's third court appearance, the accused should be asked to enter a plea and, where applicable, to make an election as to the mode of trial. Depending upon that election, a date should then be set for either a judicial pre-trial, preliminary inquiry, or trial.

8.13 The Criminal Justice Review Committee recommends that the Integrated Justice Project endeavour to develop a system which is capable of tracking the progress of cases through the criminal justice system and generating information regarding:

- total time to case disposition for each major case classification;
- elapsed time between major case events; and
- number of appearances, pre-trial resolution rates, trial rates and annual disposition rates.

8.14 The federal government give priority to the development and enactment of an "out of court" intake procedure for the criminal courts.

8.15 In the absence of *Criminal Code* amendments implementing an effective "out of court" intake model, the Criminal Justice Review Committee recommends that the province continue developing and evaluating video remand capability.

CHAPTER NINE: TRIAL PROCEDURE, EVIDENCE, AND PRELIMINARY INQUIRIES

9.1 The model pre-trial conference forms prompt the parties and the trial judge to consider whether the continuity of physical evidence is in issue.

9.2 The *Criminal Code* be amended to provide for the use of affidavit evidence to prove the continuity of physical exhibits. Cross-examination of the affiants should only be permitted with leave of the trial or preliminary inquiry judge.

9.3 In the absence of a *Criminal Code* amendment, rules of court be drafted for both the General and Provincial Divisions which would provide for the use of affidavit evidence to prove the continuity of physical exhibits. Cross-examination of the affiants should only be permitted with leave of the trial or preliminary inquiry judge.

9.4 The model pre-trial conference form prompt the parties and the trial judge to consider whether the evidence of non-contentious witnesses can be submitted by way of agreed statement of fact or affidavit.

9.5 The *Criminal Code* be amended to provide for the use of affidavit evidence to prove the time, date, and place of interception of private communications. Cross-examination of the affiants should be permitted only where leave of the trial or preliminary inquiry judge is obtained.

9.6 The *Criminal Code* be amended to provide for the use of affidavit evidence to prove the time, date, and place of reception of "911" calls. Cross-examination of the affiants should be permitted only where leave of the trial or preliminary inquiry judge is obtained.

9.7 In the absence of a *Criminal Code* amendment, Provincial and General Division rules be drafted which would allow for the reception of affidavit evidence proving the time, date, and place of intercepted private communications and "911" calls. The rules should stipulate that cross-examination of the affiants is only permitted where leave of the trial or preliminary inquiry judge is obtained.

9.8 There be a positive obligation on defence counsel to disclose, in advance of the trial date, where possible, the *curriculum vitae* and anticipated evidence of any expert witnesses the defence intends to call.

9.9 The model Provincial Division and General Division pre-trial forms prompt the parties to consider whether there will be defence experts, and ask defence counsel whether disclosure has been made. The forms should indicate that where defence fails to make disclosure, an adjournment will be granted to the Crown, if requested.

9.10 The proposed Ontario Attorney General and Solicitor General's co-ordinating committee on Crown disclosure consider the issue of how the proposed defence disclosure requirement can be implemented without unfairly prejudicing the accused.

9.11 The rules of the Ontario Court of Justice be amended to allow the parties to a criminal proceeding to bring uncontested motions and applications in writing.

9.12 The common law authority of trial judges of the Ontario Court of Justice to place time limits on oral argument and / or require submissions to be made in writing be embodied in a rule of court. The rule should be strictly permissive.

9.13 That counsel consider conducting out-of-court discoveries, and waiving the preliminary inquiry, in appropriate cases.

9.14 The model Provincial Division pre-trial form prompt the parties and the judge at a judicial pre-hearing conference to consider whether an out-of-court discovery might be appropriate.

9.15 A Provincial Division rule and a protocol for the conduct of "discovery" preliminary inquiries be drafted to regulate the conduct of discoveries. The rule and the protocol should incorporate the following features:

(a) discoveries should only be conducted with the written consent of both the Crown and defence counsel;

(b) a judge should be available upon application to make rulings if necessary;

(c) counsel should sign an undertaking indicating that they will abide by the rulings of the judge;

(d) counsel should be required to sign an agreement indicating which witnesses are to be called at the discovery proceedings and what issues will be canvassed; and

(e) the accused should sign an agreement permitting the reading in at trial of evidence taken at the discovery proceedings even if the accused was not present when the evidence was taken.

CHAPTER TEN: ALTERNATIVE MEASURES

10.1 Providing the informed and free consent of both the offender and victim is obtained, victim - offender mediation and community councils may be an appropriate means of addressing criminal behaviour in some cases.

10.2 The provincial Crown Policy Manual should be amended to include formal policies governing the use of alternative measures.

10.3 Alternative measures programs have great potential to enhance both the efficiency and quality of the criminal justice process and should be encouraged.

10.4 The government of Ontario should establish an adult diversion policy in order to minimize the appearance of unfairness which may result where:

- some parts of the province decide to establish diversion programs and others do not; or
- different eligibility criteria apply across the province.

10.5 The adult diversion policy should not mandate a single program model but should instead encourage local experimentation and community involvement.

10.6 The provincial Crown Policy Manual should be amended to require Crown counsel to consider alternatives to prosecution where available.

10.7 Community representatives should be invited to participate in the program design process. Community involvement is critical to ensure that alternative measures are not perceived as being "soft on crime" and do not inappropriately "widen the net" of the criminal justice system.

10.8 New policies and programs, including alternative measures initiatives, must be carefully planned and properly resourced. Before a project is approved, an agreement should be reached as to when an evaluation will take place and how the project's success is to be measured.

10.9 Pre-charge diversion should continue to be carefully studied by the Ontario Ministry of the Solicitor General and Correctional Services.

10.10 The government of Ontario should establish a central registry of information on alternative measures programs in the province, and / or a "best practices" manual, which will assist local stakeholders in determining which programs are effective and how they might be adapted to suit local needs and conditions. Consideration should also be given by the government of Ontario to commissioning further independent evaluations of existing programs in order to identify best practices.

CHAPTER ELEVEN: CO-OPERATION AND CO-ORDINATION

11.1 The Joint Heads of Court and Attorney General Committee establish a permanent provincial criminal justice co-ordinating committee ("PCJCC") composed of representatives of key participants in the criminal justice system. The mandate of the PCJCC would be to act as a forum where participants could:

(a) bring problems and issues of concern to the attention of other participants;

(b) engage in consultation and co-ordination;

(c) discuss solutions to problems with other participants;

(d) obtain the views of other participants with regard to possible changes in policy; and

(e) notify other participants of changes in policy.

11.2 The participants in the PCJCC be the following:

(a) the Chief Justice of the Ontario Court (General Division);

(b) the Chief Judge of the Ontario Court (Provincial Division);

(c) the Ontario Ministry of the Attorney General;

(d) the Ontario Ministry of the Solicitor General and Correctional Services, including representatives of the OPP, RCMP and municipal police forces;

(e) the Department of Justice (Canada);

(f) the Ontario Criminal Lawyers' Association;

(g) the Ontario Crown Attorneys' Association

(h) the Ontario Legal Aid Plan;

(i) Probation and Parole Services, and the Correctional Service of Canada;

(j) the Victim-Witness Assistance Program; and

(k) such other participants as the PCJCC sees fit, including *ad hoc* public participants.

11.3 The representatives of each participant in the PCJCC be senior persons with authority to discuss and resolve issues on behalf of their institutions or organizations.

11.4 The PCJCC meet on a regular basis and report to the Joint Heads of Court and Attorney General Committee as required.

11.5 Each court location establish a local criminal justice co-ordinating committee ("LCJCC") chaired by the judiciary and composed of representatives of key participants in the criminal justice system at the local level. The mandate of the LCJCC would be to act as a forum where participants could:

(a) bring problems and issues of local concern to the attention of other participants;

(b) engage in consultation and co-ordination;

(c) discuss solutions to problems with other participants;

(d) obtain the views of other participants with regard to possible changes in policy; and

(e) notify other participants of changes in policy.

11.6 The participants in each LCJCC be the following persons, or their representative:

(a) the local administrative justice of the Ontario Court (General Division);

(b) the local administrative judge of the Ontario Court (Provincial Division);

(c) the local Administrative Justice of the Peace;

(d) the local Crown Attorney;

(e) a senior representative from each policing service that uses court facilities in the area, as well as the Superintendent (or his or her designate) of each local jail;

(f) the local agent of the Department of Justice (Canada) if there is no permanent federal Crown office;

(g) a representative from either the Ontario Criminal Lawyers' Association or the county / district law association;

(h) the local manager of court operations;

(i) the local office of the Ontario Legal Aid Plan;

(j) the local office of Probation and Parole Services, and possibly the Correctional Service of Canada;

(k) the Victim-Witness Assistance Program;

(l) such other participants as the LCJCC sees fit, including *ad hoc* public participants.

11.7 If a representative attends of behalf of an official, (*e.g.:* an officer attends on behalf of the Chief of Police) then the representative should be a senior official with decision-making authority.

11.8 Each LCJCC meet on a regular basis.

11.9 The Department of Justice (Canada) and the Ontario Ministry of the Attorney General negotiate a protocol to govern the delegation of charges between their agents where persons are charged with offences contrary to the *Criminal Code* and offences contrary to other federal criminal legislation, and those charges arise out of the same criminal transactions or related criminal transactions.

11.10 The basic principles of the protocol be as follows:

(a) the jurisdiction which prosecutes the more serious charge should assume carriage of the less serious charge;

(b) where both charges are equally serious, but one offence is committed in order to facilitate the commission of the other, then the facilitating charge should be delegated;

(c) where a *Criminal Code* charge is laid relating to a breach of a probation or bail order, or a failure to appear in court, that arises from a non-*Criminal Code* charge, that

charge should continue to be prosecuted by agents of the Attorney General of Ontario;

(d) where there is no obvious delegation, then the issue should be left to the discretion of the local agent of the respective Attorneys General; and

(e) the local agents of the respective Attorneys General should retain discretion to accept or reject individual delegations.

11.11 The Ministry of the Attorney General and the Department of Justice consider assigning prosecutors jointly to very serious cases where the alleged criminal behaviour results in both *Criminal Code* and non-*Criminal Code* charges.

11.12 Specialized courts be considered where it can be shown that they are likely to either:

(a) improve the quality of justice; or

(b) result in cost savings without compromising the quality of justice.

11.13 Participants in the criminal justice system consult broadly, on an ongoing basis, with other stakeholders in the system. This consultation could take place within the context of the provincial criminal justice co-ordinating committee, or the local criminal justice co-ordinating committees.

APPENDIX A:
TERMS OF REFERENCE

I. PREAMBLE

The goal of the criminal justice system is to protect the public by means of a process that is fair, effective, and efficient. As the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions ("the Martin Committee") recognized, the management challenge for the criminal justice process is to discern how to achieve efficiency without sacrificing basic values. In the search for fair yet efficient procedures, full cooperation and involvement among all of the parties involved in the administration of justice is essential. There must be willingness on the part of all of the participants in the justice system to change the ways in which they have traditionally carried out their respective functions. The public of Ontario deserves a criminal justice system that is fair but speedier, more efficient, more accessible, and less costly.

II. OBJECTIVE

The Government of Ontario and the Ontario Court of Justice, in co-operation with the Bar, have agreed to undertake a focused review of the criminal justice process in Ontario. The review will develop recommendations on how to achieve a fair yet simpler, more efficient, more effective and less costly criminal justice process in Ontario. It will identify ways to reduce the time it takes to bring matters to trial without compromising the fundamental principles of justice.

III. THE CRIMINAL JUSTICE REVIEW COMMITTEE

The Review will be conducted by a small committee jointly chaired by the Honourable Hugh Locke, a Justice of the Ontario Court (General Division), the Honourable John Evans, a Judge of the Ontario Court (Provincial Division), and Mr. Graham Reynolds, the [then] Assistant Deputy Attorney General - Criminal Law [later replaced by Mr. Murray Segal].

IV. SCOPE OF THE REVIEW

The focus of the committee's recommendations will be on practical solutions to increase the efficiency of the criminal courts, further reduce the delay in bringing matters to trial, and shorten trials. Short and long term solutions will be considered, including improved use of resources and possible streamlining within the following key areas of the criminal justice system: (a) pre-trial and

release proceedings; (b) remand and set date process; (c) disclosure and pre-trial resolutions; and (d) trial procedures.

V. DELIVERABLES

A report which makes recommendations in accordance with the Committee's objectives.

APPENDIX B:
LIST OF CONTRIBUTORS

John D. Ayre, Crown Attorney, Simcoe

The Honourable Judge William Bassel of the Ontario Court (Provincial Division)

Chief David Boothby, Metropolitan Toronto Police

Frank Boscarial and Adelaide MacDonald, Society of St. Vincent de Paul

Andrea Bowman

Paul Calarco, Barrister & Solicitor

Captain D. K. Campbell

The Honourable Judge Ralph Carr of the Ontario Court (Provincial Division)

Central West Regional Courts Management Advisory Committee

Edward Chadband

The Honourable Judge Wayne Cohen of the Ontario Court (Provincial Division)

Tory Colvin, Association des Juristes d'Expression
Française de l'Ontario

Douglas Coveney, Rittenhouse

The Honourable Judge Jim Crawford of the Ontario Court (Provincial Division)

The Honourable Judge David Dempsey of the Ontario Court (Provincial Division)

Haig De Rusha, Barrister & Solicitor

The Honourable Judge Bruce Duncan of the Ontario Court (Provincial Division)

Alan E. Dunne

Robert Eaton and Colleen Hamilton, Probation Officers' Association of Ontario

Marlys Edwardh, Cindy Wasser, Jeff Manishen, and Brian Heller on behalf of the Advocates' Society

Peter Evans

The Honourable Judge James Fontana of the Ontario Court (Provincial Division)

The Honourable Judge Bruce Fraser of the Ontario Court (Provincial Division)

The Honourable Judge Hugh Fraser of the Ontario Court (Provincial Division)

Corrie Galloway, Halton Children's Aid Society

Vivien Green, Woman Abuse Council of Toronto

C. Justin Griffin, Barrister & Solicitor

Munyonzwe Hamalengwa, Barrister & Solicitor

The Honourable Judge Roland Harris of the Ontario Court (Provincial Division)

Mitch Hoffman, Assistant Crown Attorney, Windsor

Leslie S. Immen, The Neighbourhoods Forum

J. Kirby Inwood

Carol Johnson, Crime Concern

The Honourable Judge Karen Johnston of the Ontario Court (Provincial Division)

The Honourable Judge Heather Kataryncych of the Ontario Court (Provincial Division)

Staff Sergeant F. Kurina, Royal Canadian Mounted Police - Newmarket Detachment

The Honourable Mr. Justice Kenneth A. Langdon of the Ontario Court (General Division)

Chief Superintendent W.A. Lenton, Royal Canadian Mounted Police

The Honourable Judge Rick Libman of the Ontario Court (Provincial Division)

Sharon E. Maloney, Retail Council of Canada

William A. McTavish, QC, LSM and G. Nwabuogu, Office of the Children's Lawyer

Peter Meier, David Bayliss, Melvyn Green, James Lockyer, Joanne McLean,

The Honourable Judge Russell Otter of the Ontario Court (Provincial Division)

David Outerbridge, Leslie Paine, Edward Sapiano, and Cindy Wasser
on behalf of the Association in Defence of the Wrongly Convicted

Robert Middaugh, Assistant Deputy Minister, Policing Services, Ontario Ministry of the Solicitor General and Correctional Services

The Honourable Judge Rhys Morgan of the Ontario Court (Provincial Division)

Andrew Murie and Dr. Robert Solomon, Mother's Against Drunk Driving

The Honourable Mr. Justice Ted Ormston of the Ontario Court (Provincial Division)

Alana V. Page

Robin Parker, Department of Justice

The Honourable Judge Bruce Payne of the Ontario Court (Provincial Division)

The Honourable Judge G.A. Pockele of the
Ontario Court (Provincial Division)

Claire Price, Council of Elizabeth Fry Societies of Ontario

David G. Price, Barrister & Solicitor

The Honourable Mr. Justice Marc Rosenberg of the Ontario Court of Appeal

Fiona Sampson, Metropolitan Action Committee on Violence
Against Women and Children

Richard D. Schneider, Ontario Review Board

SHEDOH

Stephen Sherriff, Assistant Crown Attorney, Peel

William A. Sparks, Executive Director of the John Howard Society of Ontario

The Toronto Regional Courts Management Advisory Committee

The Honourable Judge William Wolski of the Ontario Court (Provincial Division)

J.D. Waugh, Crown Attorney, Perth

Graham Webb, Advocacy Centre for the Elderly

The Honourable Mr. Justice Whealy of the Ontario Court (General Division)

Elizabeth White, St. Leonard's Society of Canada

Michelle Y. Williams, Policy Research Lawyer, African Canadian Legal Clinic

APPENDIX C: RECOMMENDATIONS AND OPINIONS OF THE ATTORNEY GENERAL'S ADVISORY COMMITTEE ON CHARGE SCREENING, DISCLOSURE, AND RESOLUTION DISCUSSIONS*

CHARGE SCREENING

The Threshold Test for Commencing or Continuing a Prosecution

1. The Committee recommends that for the purposes of a threshold test regarding the screening of charges by the prosecutor, the test of a "reasonable prospect of conviction" be adopted for all offences.

2. The review to determine whether the threshold test has been met should include an assessment of the probative value of the evidence, including some assessment of the credibility of witnesses.

3. The review to determine whether the threshold test has been met should include consideration of the admissibility of evidence. The threshold test will not be met where evidence necessary to the prosecution is clearly or obviously inadmissible.

4. The review to determine whether the threshold test has been met should include a consideration of any defences, for example alibi, that should reasonably be known, or that have come to the attention of the Crown.

5. The same threshold test applies for commencing, continuing, or discontinuing a prosecution.

The Threshold Test and the Public Interest

6. The Committee recommends that public interest factors should only be considered after the threshold test has been met, and then should only be used to refrain from commencing, or to discontinue a prosecution.

Various Public Interest Factors that May be Relevant

7. The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should consider the charge or charges that best reflect the gravity of the incident.

*Ontario, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Toronto: Queen's Printer, 1993), Appendix J (Chair: G.A. Martin).

8. The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should **not** consider any political consequences for the government flowing from the prosecution.

9. The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should consider the circumstances and attitude of the victim. The attitude of the victim is not, however, decisive.

10. The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should consider the entitlement of the victim to compensation, reparation, or restitution if a conviction is obtained.

11. The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should **not** consider the status in life of either the accused or the victim.

12. The Committee therefore recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should consider the need to maintain public confidence in the administration of justice, and the effect of the incident or prosecution on public order.

13. The Committee recommends that the agent of the Attorney General should take into account national security and international relations in determining whether a prosecution is in the public interest.

14. The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should consider the availability and efficacy of alternatives to prosecution.

15. The Committee recognizes that the factors specifically discussed above are not an exhaustive enumeration of the considerations that may be relevant to an assessment of the public interest in a prosecution.

The Threshold Test and Policies, Directives and Guidelines in General

16. The Committee recommends that guidelines regarding the threshold test and what factors are included in the term "public interest" should be published by the Attorney General.

17. The Committee recommends that directives from the Attorney General to his or her agents should be few and far between.

18. The Attorney General should instruct his or her agents through the use of guidelines, which formally permit the exercise of discretion in their application.

19. Such guidelines and the rare directives which may issue should not be taken into account by agents of the Attorney General until they are published or otherwise made known to the public.

Charge Screening in Ontario

20. The Committee recommends that there exist in Ontario a system of charge screening by agents of the Attorney General.

21. The Committee recommends that there exist in Ontario a system of post-charge screening by agents of the Attorney General.

22. The Committee recognizes the long standing tradition in Ontario of police consultation with the Crown in matters of difficulty at the pre-charge stage of the investigation. The Committee encourages this tradition of co-operative consultation to continue where, in the judgment of senior police officers, consultation is warranted. Where warranted, such consultation need not be limited to matters of evidence, but should also pertain to the various public interest factors that may affect the course of the prosecution apart altogether from the evidence.

The Mechanics of Post-Charge Screening

23. The Committee recommends that the Attorney General's agents be required to conduct their post-charge review prior to setting a date for a preliminary hearing or trial.

24. The Committee recommends that the investigators should provide to Crown counsel for the purposes of screening charges, all information necessary to ascertain if the threshold test for conducting a prosecution has been met, and all information necessary to assess the impact of any relevant public interest factors in the prosecution. This material will necessarily include, but will not be limited to, that which is required for disclosure.

25. The Committee recommends that the Attorney General require his or her agents to be duly diligent in making efforts to obtain all information that relates to a case for purposes of screening and disclosure.

DISCLOSURE

General Recommendations with Respect to Disclosure

Disclosure Recommendations Pertaining to Investigations

26. The Committee recommends that the Attorney General request that the Solicitor General issue a statement to all police officers emphasizing the importance of taking careful, accurate, and contemporaneous notes during their investigations. (The statement should emphasize that disclosure

requirements after *Stinchcombe* cannot be thwarted by making less accurate or less comprehensive notes).

27. The Committee recommends that, upon request, copies of relevant original notes should be disclosed, subject to editing or non-disclosure where the public interest requires it, including editing or non-disclosure, where necessary, to protect confidential informants, the existence of on-going investigations, and the integrity of police investigative techniques.

28. The Committee recommends that statements of suspects or accused persons taken at the police station or wherever such persons are detained be video taped or audio taped, preferably video taped. It is recognized that this may not always be practical or technically feasible.

Ethical and Legal Obligations Relating to Disclosure

The Police

29. The Committee recommends that s. 1(c)(viii) of the Code of Offences, a Schedule to Regulation 791 under the *Police Services Act*, R.S.O. 1990, c. P-15, be amended to read as follows:

> 1. Any chief of police, or other police officer or constable commits an offence against discipline if he is guilty of
>
> (c) NEGLECT OF DUTY, that is to say, if he,
>
> ...where a charge is laid fails to disclose to the officer in charge of the prosecution or the prosecutor any information that he or any person within his knowledge can give for or against any prisoner or defendant.

Crown Counsel

30. The Committee recognizes that it is a serious disciplinary offence for the Crown to fail to disclose to the defence as required.

31. The Committee recommends that it is inappropriate for Crown counsel to limit or refuse disclosure in a case, unless defence counsel agrees to limit a preliminary inquiry so as to ensure efficient use of court time. This does not preclude counsel from agreeing to shorten or waive a preliminary inquiry.

32. The Committee recommends that it is inappropriate for the Attorney General to withhold disclosure, unless defence counsel gives an undertaking not to share the information with his or her client.

Defence Counsel

33. The Committee acknowledges that, at present, there is no obligation upon the defence to disclose any part of its case before trial. The Committee makes no further recommendation in this respect.

34. The Committee is of the opinion that it is inappropriate for any counsel to give disclosure materials to the public. Counsel would not be acting responsibly as an officer of the Court if he or she did so.

35. The Committee is of the opinion that defence counsel should maintain custody or control over disclosure materials, so that copies of such materials are not improperly disseminated. Special arrangements may be made between defence and Crown counsel, with respect to maintaining control over disclosure materials where an accused is in custody, and where the volume of material disclosed makes it impractical for defence counsel to be present while the material is reviewed.

Disclosure and Summary Conviction Offences

36. The Committee recommends that the nature and extent of disclosure should not vary based on whether the charge was prosecuted by way of indictment, summary conviction procedure, or prosecuted under the *Provincial Offences Act*.

37. The Committee recommends that in all summary conviction matters under the *Criminal Code* which are commenced by a private complainant, the Crown should intervene to either withdraw the charge or to conduct the prosecution. If the Attorney General intervenes and conducts the prosecution, disclosure should be made in the same way as any other prosecution. Nothing herein is to be construed as precluding the Attorney General from assuming carriage of prosecutions under the *Provincial Offences Act* in appropriate cases, for example, under the *Environmental Protection Act*.

Other Recommendations

38. The Committee recommends that the Attorney General should require reasonable efforts from his or her agents to determine the sufficiency of disclosure. It is recognized that the obligation to provide disclosure is on-going.

39. The Committee recommends that all accused persons be advised of their right to disclosure, and where disclosure may be obtained, by written notice on all release forms or summonses.

40. As a general rule, the Committee is in favour of disclosure in writing.

Recommendations Relevant to a Proposed New Disclosure Directive

41. The Committee recommends that the Attorney General issue a new Directive on Disclosure, based upon the following recommendations and principles.

Purpose and General Principles of Disclosure

1. *The purpose of disclosure is to assist in guaranteeing the accused's common law and constitutional rights to a fair trial and to make full answer and defence.*

2. *Timely and full disclosure by Crown counsel, where diligently utilized by the defence, benefits both the accused and the administration of justice as a whole. Among the benefits are:*

   (a) *the resolution of non-contentious and time-consuming issues in advance of the preliminary hearing or the trial, which ensures the most efficient use of court time;*

   (b) *the waiver or shortening of preliminary hearings and the shortening of trials; and*

   (c) *early resolution of cases, including, where appropriate, the entry of pleas of guilty or the withdrawal of charges.*

3. *The governing principle is that Crown counsel is under a duty to disclose all information in his or her possession relevant to the guilt or innocence of the accused, unless the information is excluded from disclosure by a legal privilege. Crown counsel's duty to disclose any relevant information in his or her possession, whether favourable or unfavourable to the accused, extends to any information which is not clearly irrelevant. All decisions by Crown counsel not to disclose on grounds of either privilege or relevance are reviewable by the trial judge.*

4. *Part of Crown counsel's obligation to disclose all relevant information in his or her possession includes the disclosure of information in his or her possession which is relevant to the prosecution's case, thus enabling the accused to know the case that he or she must meet. Crown counsel must not withhold such information for the purpose of cross-examining on it. This paragraph does not require pre-trial disclosure of reply evidence tendered by Crown counsel in response to issues raised by the accused at trial where the relevance of that evidence first becomes apparent during the course of the trial itself.*

5. *Crown counsel's obligation to disclose is a continuing one and disclosure of additional relevant information must be made when it is received. Even after conviction, including after any appeals have been decided or the time for appealing has lapsed, Crown counsel must disclose information which he or she realizes shows an accused is innocent or which raises a doubt as to the accused's guilt.*

6. *An accused is entitled to disclosure, but where an accused is represented by counsel this right is triggered by a request for disclosure made by counsel. It is recommended that such disclosure requests be made in writing. Where there has been a timely request by defence counsel, disclosure must be made before plea or election. Defence counsel who wish disclosure have a responsibility to make a timely request for it. Where the request is not timely, disclosure must be made as soon as reasonably practical and, in any event, before trial. However, even in the absence of a request, Crown counsel must specifically advise the defence before trial, whether the accused is represented or not, of any information in his or her possession that is obviously exculpatory or which Crown counsel realizes is exculpatory of the accused. Disclosure must be provided or waived prior to any resolution discussions.*

7. *Where the accused is not represented by counsel, the Court or Crown counsel must inform the accused of the right to disclosure and how to obtain it. The accused should be advised of the right to disclosure and how to obtain it as soon as he or she indicates an intention to proceed unrepresented. Unless the unrepresented accused clearly indicates that he or she does not wish disclosure, it must be provided before plea or election, so as to enable the accused sufficient time before plea or election to consider the information disclosed. Disclosure must be provided or waived prior to any resolution discussions.*

8. *Crown counsel has a discretion, reviewable by the trial judge:*

   (a) *to withhold disclosure where he or she has reasonable cause to believe withholding is necessary to preserve the identity of an informant, to preserve the solicitor-client privilege, or to preserve investigation techniques; and*

   (b) *to delay disclosure where he or she has reasonable cause to believe delay is necessary to protect the safety or security, which includes protection from harassment, of persons who have supplied information to the Crown, or to complete an investigation. Any delays in disclosure to complete the investigation should, however, be rare.*

9. (a) *Defence counsel should not leave disclosure material in the unsupervised possession of an accused person.*

   (b) *An unrepresented accused is entitled to the same disclosure as the represented accused. However, if there are reasonable grounds for concern that leaving disclosure material with the unrepresented accused would jeopardize the safety, security, privacy interests, or result in the harassment of any person, Crown counsel may provide disclosure by means of controlled and supervised, yet adequate and private, access to the disclosure materials.*

Incarcerated, unrepresented accused persons are entitled to adequate and private access to disclosure materials under the control and supervision of custodial authorities. Crown counsel shall inform the unrepresented accused, in writing, of the appropriate uses and limits upon the use of the disclosure materials.

10. *Dialogue between Crown and defence counsel before and after disclosure and, in any event, prior to setting a date for a preliminary inquiry or trial, is strongly encouraged. Crown counsel and defence counsel, as officers of the Court, will usually be able to resolve disputes with respect to disclosure. If they are unable to resolve a dispute, the trial judge must resolve it.*

11. *The principle of disclosure applies to prosecutions for indictable offences, summary conviction offences and prosecutions under the Provincial Offences Act. In all such prosecutions, the Crown, or the private prosecutor, is required to provide complete disclosure in accordance with these recommendations, save where they are inapplicable.*

Particular Requirements

12. *The accused, pursuant to the foregoing principles, is entitled to complete disclosure. Without limiting the generality of the foregoing, the Crown is required to provide the following information in its possession unless clearly irrelevant:*

    (a) a copy of the charge or charges contained in the information and indictment;

    (b) an accurate synopsis of the circumstances of the offence alleged to have been committed by the accused, as prepared by the investigating agency;

    (c) All statements obtained from persons who have provided relevant information to the authorities should be produced, even though Crown counsel does not propose to call them as witnesses. Statements of any co-accused (whether made to a person in authority or not) should also be produced. Crown counsel shall provide to the accused:

        (i) copies of any written statements;

        (ii) copies of any will-say summaries of anticipated evidence, and copies of the investigator's notes or reports from which they are prepared, if such notes or reports exist;

(iii) a reasonable opportunity, in private, to view and listen to the original or a copy of any audio or video recordings of any statements made by a potential witness other than the accused. This does not preclude Crown counsel, in his or her discretion, from providing copies of any video or audio recording or a transcript thereof, where applicable;

(iv) Where statements or recordings do not exist, copies of the investigator's notes, in relation to the persons who have provided relevant information to the authorities, must be provided. If there are no notes, then all relevant information in the possession of Crown counsel that the person could give should be supplied, subject to Crown counsel's discretion to delay disclosure.

(v) In addition to the foregoing, Crown counsel may, upon request by the defence, also provide the name, address, and occupation of any person who has relevant information to give, subject to Crown counsel's discretion to delay or withhold such disclosure.

(vi) Any discretion exercised by the Crown with respect to disclosure of the foregoing is reviewable by the trial judge.

(d) information regarding the criminal record of the accused and any co-accused;

(e) a copy of any written statement made by the accused to a person in authority, and, in the case of verbal statements, an accurate account of the statement attributed to the accused and copies of any investigator's notes in relation thereto, and a copy of, and a reasonable opportunity to view and listen to, any original video or audio recorded statement of the accused to a person in authority. All such statements or access thereto must be provided whether or not they are intended to be introduced in evidence.

(f) a copy of any police occurrence reports and any supplementary reports;

(g) as soon as available, copies of any forensic, medical, and laboratory reports which relate to the offence, including all adverse reports, except to the extent that they may contain irrelevant or privileged information;

(h) where reasonably capable of reproduction, and where Crown counsel intends to introduce them into evidence, copies of documents, photographs, audio or video recordings of anything other than a statement by a person, and other materials should normally be supplied to the defence. The defence may be limited to a reasonable opportunity, in private, to view and listen to a copy

of any audio or video recording where Crown Counsel has reasonable cause to believe that there exists a reasonable privacy or security interest of the victim(s) or witness(es), or any other reasonable public interest, which cannot be satisfied by an appropriate undertaking from defence counsel.

(i) *a copy of any search warrant relied upon by the Crown, the information in support, and a list of items seized thereunder, if any;*

(j) *if intercepted private communications will be tendered, a copy of the judicial authorization under which the private communications were intercepted;*

(k) *an appropriate opportunity to inspect any relevant items seized or acquired during the investigation of the offence which remain in the possession of the investigators, whether or not Crown counsel intends to introduce them as exhibits in court;*

(l) *upon request, information regarding criminal records of material Crown or defence witnesses that is relevant to credibility;*

(m) *upon request, any information in the possession of Crown counsel, for example, information regarding outstanding criminal charges or criminal convictions demonstrated to be relevant by the defence; and*

(n) *where identity is in issue, and the Crown relies in whole or in part on the visual identification of the accused as the person seen in the circumstances of the crime, all information in the possession of Crown counsel that has a bearing on the reliability of the identification must be disclosed to the accused.*

13. *Crown counsel is required to disclose any information in his or her possession relevant to the credibility of any proposed Crown witness. Without limiting the generality of the foregoing, Crown counsel is required, for example, to disclose:*

(a) *any prior inconsistent statements or subsequent recantations of that person;*

(b) *particulars of any promise of immunity or assistance given to that person with respect to a pending charge, bail, or sentence, or any other benefit or advantage given; and*

(c) *any mental disorder that person is suffering from which may be relevant to the reliability of his or her evidence.*

14. *Subject to Crown counsel's discretion as to relevance, which is reviewable by the trial judge, counsel on behalf of the accused or an unrepresented accused may, upon request, inspect the investigative agency's file in relation to the offence. The defence should, where possible, particularize their request to assist Crown counsel in exercising their discretion as to the relevance of undisclosed information in the investigative file. Any dispute arising from such a request should usually be resolved in discussions between Crown and defence counsel. This recommendation does not preclude Crown counsel from limiting the defence to access to photocopies of the file material wherever necessary to preserve the integrity of the originals, for example, where editing the originals would destroy their integrity, or taking other reasonable steps necessary to protect:*

    (a) the safety, security or freedom from harassment of people who have provided information to the Crown;

    (b) the informer privilege;

    (c) any other privilege; or

    (d) on-going police investigations or investigative techniques.

15. *Crown counsel generally need not disclose any internal Crown counsel notes, memoranda, correspondence, or legal opinions. Where, however, Crown counsel learns of additional relevant information in the course of interviewing Crown witnesses, defence counsel or an unrepresented accused should be advised of that information as soon thereafter as practicable.*

16. *Crown counsel shall advise the defence of any decision made not to disclose information in his or her possession that should otherwise be disclosed, and the importance of that information. Crown counsel shall also advise the defence of the specific nature of the information in his or her possession which is not disclosed, unless disclosure of the nature of the information withheld would reveal the identify of an informer, jeopardize anyone's safety or security or subject them to harassment, compromise an on-going investigation, or reveal police investigative techniques. Upon request Crown counsel shall take any other steps reasonably necessary to facilitate a review by the trial judge of any decision not to disclose.*

17. *Nothing herein precludes defence counsel from making further requests to Crown counsel for disclosure of information in the possession of Crown counsel of the investigating authorities. Defence and Crown counsel are strongly encouraged to narrow and define the issues to assist Crown counsel in determining whether information is relevant.*

18. *Information in the possession of bodies, such as boards, social agencies, and other governmental departments, is not in the possession of Crown counsel or the investigating agency for disclosure purposes. Where Crown counsel receive requests for information not in their possession or the possession of the investigative agency, the defence should be so advised in a timely manner in order that they may take such other steps to obtain the information as they see fit.*

19. *The Crown may, in its discretion, require written acknowledgement from defence counsel or an unrepresented accused of disclosure received.*

20. *Where the names and addresses of witnesses are supplied to the defence by the Crown or investigative agency, the witnesses may be informed that there is no property in a witness and that the defence is entitled to interview them, but that they are not required to grant an interview: it is strictly their decision. Care must be taken, however, to ensure that the witnesses are not left with the impression that they should not grant the defence an interview. There should be a standard form of providing this advice where it is given.*

Implementing Disclosure

42. The Committee recommends that the Solicitor General co-ordinate with federal authorities and that both issue such directives as are necessary, to require all police forces operating within the province of Ontario to be aware of and comply with the Attorney General's Directive on Disclosure in their relations with Crown prosecutors. These directives should also make clear that the police and other investigators

(a) are bound to exercise reasonable skill and diligence in discovering all relevant information, even though such information may be favourable to the accused;

(b) are under a duty to report to the officer in charge or to Crown counsel all relevant information of which they are aware, including information favourable to the accused, in order that Crown counsel may discharge the duty to make full disclosure; and that

(c) a failure to disclose all relevant information as required is a disciplinary offence.

43. The Committee recommends that the police should bear all production costs including labour, equipment, and material costs associated with the preparation and delivery to the Crown of the Crown Brief, photographs, and other exhibits or material used in the prosecution of a case in court. The Ministry of the Attorney General will bear the actual material costs needed to produce

second or subsequent copies of Crown Briefs intended for disclosure purposes to defence counsel or to the accused person.

44. The Committee recommends that an accused person should not have to pay for basic disclosure.

Disclosure and Accused Persons in Custody

45. The Committee recommends that the Attorney General recommend to Cabinet and the federal Minister responsible for penitentiaries that procedures and facilities be set up for controlling disclosure materials for accused who are in custody while, at the same time, providing the accused supervised, yet full and private, access to these materials.

RESOLUTION DISCUSSIONS

46. The Committee is of the opinion that resolution discussions are an essential part of the criminal justice system in Ontario, and, when properly conducted, benefit not only the accused, but also victims, witnesses, counsel, and the administration of justice generally.

Recommendations Relating to the Conduct of Resolution Discussions

47. The Committee recommends that Crown counsel should not accept a plea of guilty to a charge where he or she knows that the accused is innocent.

48. Where Crown counsel knows that the prosecution will never be able to prove a material element of the case, Crown counsel has a duty to disclose this to the defence.

49. The Committee recommends that Crown counsel can accept a plea of guilty where he or she is aware that the prosecution will never be able to prove a material element of the offence provided this state of affairs is fully disclosed to the defence.

50. The Committee recommends that the Attorney General should require all of his or her agents conducting resolution discussions to ensure that the Crown's position on sentence not be formulated simply for reasons of expediency, and not otherwise bring the administration of justice into disrepute.

51. The Committee recommends that the Attorney General should require his or her agents conducting resolution discussions to consider the interests of victims. The Attorney General should require his or her agents conducting resolution discussions to consult with any victims, where appropriate and feasible, prior to concluding such discussions.

52. The Committee recommends that the Attorney General emphasize to his or her agents that a plea of guilty is a circumstance in mitigation of sentence, and when the plea of guilty is offered at the first reasonable opportunity it is particularly mitigating.

53. The Committee recommends that, as a general rule, counsel must honour all agreements reached after resolution discussions. However, on rare occasions, it is appropriate for senior Crown counsel, after reviewing an agreement made by the Crown, to repudiate that agreement if the accused can be restored to his or her original position, and if the agreement would bring the administration of justice into disrepute.

Recommendations Concerning Courtroom Practice Following Resolution Discussions

54. The Committee recommends that, as a general rule, open to some exceptions, Crown counsel should state on the record in open court that resolution discussions have been held and that an agreement has been reached.

55. The Committee recommends that where a plea of guilty is entered, the trial judge should question the accused to ensure:

(a) that they appreciate the nature and consequence of a plea of guilty;

(b) that the plea is voluntarily made; and

(c) that they understand that an agreement between the Crown prosecutor and defence counsel does not bind the court.

56. The Committee recommends that the Attorney General seek an amendment to the *Criminal Code* requiring a sentencing judge to question the accused as set out above, whether the accused is represented by counsel or not.

57. The Committee recommends that it is improper for the Crown to withhold from the court any relevant information in order to facilitate a guilty plea. In cases where not all matters are admitted, the Crown should advise the Court of the allegations and then proceed upon the admitted facts. In such cases, the Court will sentence on the admitted facts only.

58. The Committee is of the opinion that a sentencing judge should not depart from a joint submission unless the proposed sentence would bring the administration of justice into disrepute, or is not otherwise in the public interest.

59. The Committee observes that Crown counsel at trial cannot bind the Attorney General's discretion to appeal. The Committee recommends that where Crown counsel at trial agrees to a joint submission which the sentencing judge accepts, the Attorney General should appeal only where the sentence is so wrong as to bring the administration of justice into disrepute.

Procedural Aspects of Resolution Discussions

60. The Committee is of the opinion that Crown and defence counsel have a professional obligation to meet prior to trial where appropriate to resolve issues. The Committee is of the opinion that both Crown and defence counsel have a professional obligation to act responsibly in arranging meetings and responding to initiatives aimed at resolving criminal cases as early as possible. This will reduce demand for court time and ensure that court time scheduled is used efficiently.

61. The Committee recommends that, apart from cases in which the accused is in custody, or lengthy or complex cases, the Attorney General should require the completion of disclosure and the conduct of resolution discussions before the setting of a date for a preliminary hearing or trial.

62. The Committee recommends that, absent exceptional circumstances, there should not be resolution discussions at the trial courtroom door rather than at an earlier stage in the proceedings.

Pre-Hearing Conferences

63. The Committee endorses pre-hearing conferences as a very useful and necessary aspect of the administration of criminal justice in Ontario. Participation by the judiciary in pre-hearing conferences is, in the Committee's view, both proper and just, and can contribute greatly to the early and fair resolution of many cases. The Committee encourages the judiciary to convene and participate in such conferences where appropriate.

64. The Committee recognizes that the procedure for conducting pre-hearing conferences varies throughout the province depending on local circumstances. The Committee supports this sensitivity to local conditions, and recommends that there be no uniform and province-wide manner of conducting pre-hearing conferences put in place. The Committee does, however, endorse some basic principles as necessary for an effective pre-hearing conference.

65. The Committee recommends that a pre-hearing conference should not take place until disclosure has been either obtained or waived.

66. The Committee recommends that a pre-hearing conference should take place as soon as possible after all participating counsel have had a reasonable opportunity after disclosure to familiarize themselves with the particular case.

67. The Committee recommends that all counsel participating in the pre-hearing conference must be fully familiar with the case, and must be in a position to make admissions or agreements on behalf of the Crown or the client, as the case may be.

68. The Committee recognizes that it is always open to the presiding judge, for reasons which seem sufficient to that judge, to record part of all of a pre-hearing conference.

69. The Committee recommends that any agreement reached, or position taken (such as decisions on admissibility of evidence, or what *Charter* issues will be raised), excluding any position taken on the issue of sentence, should be recorded in writing by the pre-hearing conference judge.

70. The Committee recommends that a pre-hearing conference may cover the entire range of issues in a case, including plea and sentence.

71. The Committee recommends that the pre-hearing conference must be scheduled so as allow sufficient time to fully discuss the case.

72. The Committee recommends that all parties participating in a pre-hearing conference must be afforded a fair opportunity to state their positions and participate in the discussions.

73. The Committee is of the opinion that a judge presiding at a pre-hearing conference should not be involved in plea bargaining in the sense of bartering to determine the sentence, or pressuring any counsel to change their position. The presiding judge may, however, assist in resolving the issue of sentence by expressing an opinion as to whether a proposed sentence is too high, too low, or within an appropriate range.

74. The Committee recommends that if everyone is agreed on the suggested range of sentence, and is content with the practice, there is no difficulty with the pre-hearing judge going on to hear the plea of guilty. However, the pre-hearing judge should not hear the plea of guilty, or any contested proceedings in the same prosecution other than adjournments or attendances to set dates, unless all parties consent.

75. The Committee recommends that, during a plea and sentencing following a pre-hearing conference, it is important to create a full record in open court, including sufficient detail about the circumstances of the offence, the offender, and, where appropriate, the victim.

76. The Committee recommends that the Attorney General request of the federal government that s. 625.1 of the *Criminal Code* be amended to read as follows:

> **s.625.1(1)** Subject to subsection (2), on application by the prosecutor or the accused or on its own motion, the court before which, or the judge, provincial court judge or justice before whom, any proceedings are to be held, may order that a conference between the prosecutor and the accused or counsel for the accused, to be presided over by the court, a judge, or a provincial court judge or justice, be held prior to the proceedings to consider such matters as will promote a fair and expeditious hearing, including, where just and appropriate, final resolution of the charges in issue in the proceedings. The judge, provincial court judge or justice who presides over such a conference shall not preside over the trial, a plea of guilty, or any contested proceeding other than adjournments or attendances to set dates in the same matter without the consent of the prosecutor and the accused.
>
> **(2)** In any case to be tried with a jury, a judge of the court before which the accused is to be tried shall, prior to the trial, order that a conference between the prosecutor and the accused or counsel for the accused, to be presided over by a judge of that court, be held in accordance with the rules of court made under section 482 to consider such matters as will promote a fair and expeditious hearing, including, where just and appropriate, final resolution of the charges in issue in that case.

77. The Committee is of the view that, absent exceptional circumstances, it is inappropriate to engage in resolution discussions with the trial judge in Chambers.

78. The Committee is of the view that, as a general rule, open to some exceptions, any resolution discussions that do take place with the trial judge in Chambers should be recorded.

79. The Committee recommends that the Attorney General issue such public guidelines as are appropriate to implement the Committee's recommendations with respect to resolution discussions.

CONCLUDING RECOMMENDATION

80. The Committee recommends that the Solicitor General and the Attorney General take appropriate steps and commit sufficient resources to provide instruction, training and continuing education for police officers and Crown counsel as to the Committee's recommendations and views.

APPENDIX D:
PROVINCE OF ONTARIO
MINISTRY OF THE ATTORNEY GENERAL

CROWN POLICY MANUAL

Policy No.	Original Date	Update
CS-1	January 15, 1994	February 10, 1995

Charge Screening

Cross Reference:
Disclosure
Resolution Discussions
Child Abuse - Physical & Sexual
Spouse-Partner Assault
Victim Witness with Special Needs
Sexual Offences
Victims of Crime

INTRODUCTION

The decision to continue or terminate a prosecution is among the most difficult Crown counsel must make.

The community must rely on Crown counsel to vigorously pursue provable charges while protecting individuals from the serious repercussions of a criminal charge where there is no reasonable prospect of conviction.

In introducing the subject of screening, the *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (the Martin Committee Report) had this to say:

> The question of what standard to apply when determining the sufficiency of evidence and the public interest in prosecution is an extremely important one. In the committee's view, the proper standard, or proper threshold test, must be one that does

not unduly restrict Crown counsel's prosecutorial discretion, but at the same time prevents the process of the criminal law from being used oppressively, where there is no realistic prospect of a conviction on the evidence. The prosecution must also be in the public interest. Crown counsel, when assessing whether it is in the public interest to recommend commencing criminal proceedings against a person, or the discontinuing of criminal proceedings against an accused, must take into account more than the sufficiency of the evidence against that person: all relevant circumstances must be considered, keeping in mind that "the contemporary view favours restraint generally in the exercise of the criminal law power".

POLICY AND PROCEDURES

1. **(a)** Every charge must be screened by Crown counsel as soon as practicable after the charge arrives at the Crown's office and prior to setting a date for preliminary hearing or trial.

(b) Screening is the on-going review by the Crown Attorney's office of every charge in the criminal justice system to determine:

i) whether there is a reasonable prospect of conviction;

ii) whether it is in the public interest to discontinue a prosecution even though there is a reasonable prospect of conviction;

iii) whether the proper charge has been laid;

iv) whether a hybrid or summary conviction offence can reasonably be substituted for an indictable offence;

v) whether the investigation is complete and the fruits of that investigation are available to Crown counsel and defence;

vi) whether an offer of diversion should be made to the accused;

vii) whether it is appropriate to stay the charge pursuant to Section 579 of the Criminal Code as a minor property offence (see Note A attached to this Crown Policy); and

viii) whether the prosecution of the charge, and/or in some cases, the conduct of the bail hearing should be specially assigned to a Crown counsel.

(c) The obligation to screen charges is on-going as new information is received by Crown counsel in preparation for and during the conduct of bail hearings, pre-trials, preliminary hearings, and trials.

THRESHOLD TEST - REASONABLE PROSPECT OF CONVICTION

2. **(a)** When considering whether or not to continue the prosecution of a charge the first step is to determine if there is a reasonable prospect of conviction. If the Crown determines there is no reasonable prospect of conviction, at any stage of the proceeding, then the prosecution of that charge must be discontinued.

(b) The threshold test of "reasonable prospect of conviction" is objective. This standard is higher than that set out in *United States* v. *Sheppard* and signifies that a guilty verdict would not be unreasonable. The standard does not require a conclusion that a conviction is more likely than not. In applying this test, Crown counsel will want to consider the following factors:

i) the availability of evidence;

ii) the admissibility of evidence. This factor is not meant to institutionalize the *status quo*. It may be appropriate to continue a prosecution in which evidence is initially inadmissible to try to effect a change in the law - *e.g.: R.* v. *Khan, R.* v. *K.G.B.*;

iii) some assessment of the credibility of witnesses without usurping the function of the trier of fact. Crown counsel should not substitute their own or a particular judge's subjective views about criminal proceedings but should look to the objective indications in the evidence; and

iv) a consideration of any defences that should reasonably be known or that have come to the attention of the Crown.

PUBLIC INTEREST

3. **(a)** If there is a reasonable prospect of conviction then Crown counsel should consider whether it is in the public interest to discontinue the prosecution. The public interest factors can only be considered after the threshold test in paragraph 2 has been met.

(b) In determining whether it is in the public interest to continue or discontinue a prosecution the following factors must be excluded from consideration:

i) the accused's race, religion, sex, national origin, political associations or status in life;

ii) the personal feelings of any official involved in the prosecution concerning the alleged victim or the accused;

iii) any partisan political advantage or disadvantage which might flow from the decision to undertake or stop a prosecution; or

iv) the possible effect on the personal or professional circumstances of anyone connected to the prosecution decision.

(c) The following is a list of public interest factors that *may* be taken into account. No one factor is determinative and it is not an exhaustive list as some cases will raise unique factors:

i) the gravity or triviality of the incident. In determining if an incident is "grave", reference should be made to the Crown Policies found in this Manual, including those on firearms, child abuse, sexual assault, spouse/partner assault, child abduction, drinking/driving offences, gay bashing, and racially motivated crimes;

ii) the circumstances and views of the victim;

iii) the age, physical health, mental health or special infirmity of an accused or witness;

iv) the need to maintain public confidence in the administration of justice;

v) national security and international relations;

vi) the degree of culpability of the accused (particularly in relation to other alleged parties to the offence);

vii) the prevalence of the type of offence and any related need for deterrence;

viii) whether the consequences of any resulting conviction would be unduly harsh or oppressive;

ix) whether the accused is willing to co-operate or has already co-operated in the investigation or prosecution of others;

x) the likely outcome in the event of a finding of guilt, having regard to the sentencing options available to the court;

xi) the strength of the Crown's case, the staleness of the alleged offence, or, the likely length and expense of the trial when considered in relation to the seriousness of the offence. Some cases, for example certain property offences, may be required to meet a higher threshold test, such as a likelihood of conviction, than a serious crime of violence where the lesser threshold set out in paragraph 2 is in the public interest;

xii) the availability and efficacy of any alternatives to prosecution such as diversion, civil remedies, or a stay of proceedings in minor property cases (see Note A attached to this Crown Policy).

xiii) the content of any published policy statement from the Ministry of the Attorney General including any commentaries on this Crown Policy.

4. Crown counsel must be duly diligent in making efforts to obtain all information that relates to a charge for purposes of screening. If Crown counsel are not reasonably satisfied that they have obtained all such information they should seek it from the investigators. This material will include but will not be United to that which is required for disclosure.

5. Any charges that fail to meet the threshold test or that are to be discontinued in the public interest must be spoken to by Crown counsel in open court and brief reasons on the record should accompany any request for a stay or withdrawal.

6. Wherever appropriate and feasible, given the nature of the charges, Crown counsel personally or through an agent should notify the victim, or someone who speaks on behalf of the victim, prior to withdrawing screened charges. The greater the degree of threat, injury or financial loss, the greater the duty to consult with the victim.

NOTE A

THE PROSECUTION OF MINOR PROPERTY CRIMES

The protection of the property interests of people in Ontario is important to the Attorney General, however, the protection of those interests does not require the full use of the criminal process in all cases. The needs and interests of society can, in some minor cases, be better served through the exercise of prosecutorial discretion to stay the prosecution upon certain conditions, rather than proceeding to a full trial. The paramount considerations in such cases should be the protection of the interests of the victim of the alleged crime, the need to efficiently use limited court resources and the determination whether the interests of justice require a full trial.

Consequently, where Crown counsel is satisfied after a proper review of an investigation leading to a minor property charge that the accused has no prior criminal record (including a prior finding of guilt and discharge) or outstanding charge(s) and the amount of any damage has been agreed upon, the minor property charge may be stayed pursuant to Section 579 if restitution is made to the victim and the circumstances of the case otherwise justify the exercise of this discretion. Such circumstances would include any indication of remorse, any likelihood of recidivism, the value of the property, the wishes of the victim, and any other mitigating or aggravating circumstances. The essential basis for the exercise of discretion in these cases is Crown counsel's determination that the process of charging a first offender with a minor property offence, bringing him/her to court, and obtaining restitution for the victim has had sufficient deterrent effect. In these circumstances the charge should be stayed in the "public interest" as a full trial is an unnecessary use of the criminal sanction and its attendant resources.

For the purposes of this Policy Statement, "minor property charge" means false pretences under, theft under, possession of property obtained by crime under, mischief joy riding, fraud under, obtaining food and lodging by fraud, and fraud transportation. Cause disturbance, while not strictly a property offence, does relate to the enjoyment of public property and can be treated as part of this guideline.

This guideline applies in addition to and not in derogation from any diversion programs. It also applies in addition to and not in derogation from any other properly exercised discretion to withdraw a charge in a case that falls outside of this guideline.

The Attorney General has delegated the Section 579 power to stay charges to Crown counsel for the purposes of this minor property crime procedure.

CHARGE SCREENING COMMENTARY

While Crown prosecutors have 'screened and vetted" charges on an informal basis for some time, charge screening as a formal Crown Policy was only instituted in 1994. It is therefore not surprising that charge screening, as a new policy, has been the subject of some early debate and discussion.

This commentary, which should be included in the Crown Policy Manual and read together with CS-1, is intended to clarify and elaborate on the policy and thus assist Crown prosecutors in their screening duties.

Much of the early debate has focused on whether the test of "reasonable prospect of conviction" is being properly applied by Crown prosecutors in sexual assault cases or in other "politically sensitive" cases where it is said that prosecutors fear criticism from interest groups if they withdraw charges. The commentary that follows will therefore focus mainly on the problems that often arise when screening this kind of case.

"Reasonable Prospect of Conviction" is the first branch of the Charge Screening Policy and it is defined in CS-1 at paragraph 2 as follows:

> The threshold test of "reasonable prospect of conviction" is objective. This standard is higher than that set out in *United States* v. *Sheppard* and signifies that a guilty verdict would not be unreasonable. That standard *does not* require a conclusion that a conviction is more likely than not.
>
> In applying this test Crown counsel will want to consider the following factors:
>
> (i) the availability of evidence;
>
> (ii) the admissibility of evidence. This factor is not meant to institutionalize the *status quo*. It may be appropriate to continue a prosecution in which evidence is initially inadmissible to try to effect a change in the law - *e.g.: R.* v. *Khan, R.* v. *K.G.B.*;
>
> (iii) some assessment of the credibility of witnesses without usurping the function of the trier of fact. Crown counsel should not substitute their own or a particular judge's subjective view about criminal proceedings but should look to the objective indications in the evidence; and
>
> (iv) a consideration of any defences that should reasonably be known or that have come to the attention of the Crown.

That above test or standard set out in CS-1 lies somewhere between the "*prima facie* case" from *Sheppard* (which is too low) and the "probability of conviction" standard (which a number of other jurisdiction have adopted but which the Martin Report found to be too high). The term "reasonable prospect of conviction", denoting a middle ground between these two standards, is a legal term of art that is not capable of precise scientific application. It requires the exercise of prosecutorial judgment or discretion based on objective indicators found in the case itself.

The case law describing the concept of "unreasonable verdict" found in s.686(l)(a)(I) of the *Criminal Code,* provides a useful analogy. The approach taken by an appellate court examining the written record from a case, without hearing the witnesses, and concluding that a guilty verdict is "reasonable", provides a helpful guide to Crown prosecutors examining the record prior to trial and asking whether there is a "reasonable prospect of conviction."

The main difficulty in applying the charge screening policy relates to our assessment of the credibility of witnesses. When the prosecution is based on the uncorroborated evidence of a single witness and where there are difficulties with that witness' credibility, an obvious question arises as to whether the charge should be "screened out". The answer to this question would not be difficult if we applied a "probability of conviction" test. Whenever a prosecution is based on a single witness, whose evidence is subject to some difficulties, a prosecutor might well conclude that a conviction is not likely or probable. But this is not the test we apply. The standard set out in CS-1, based on the Martin Report, is whether a conviction would be "reasonable". If the prosecutor concludes that the single witness' evidence is reasonably capable of belief and that the difficulties can be explained, thus providing a reasonable basis for the trier of fact to believe the witness and convict, then the charge should not be "screened out" at this initial stage. It must be remembered that the "reasonable prospect of conviction" test is only the first stage in applying the charge screening policy. Consideration of the probability or likelihood of conviction can become relevant at the second stage of charge screening, when applying the "public interest" test, which will be discussed later in this commentary. But probability or likelihood of conviction plays no role at the initial stage of assessing "reasonable prospect of conviction".

The recent judgment of the Supreme Court of Canada in *Francois v. The Queen,* (1994), 31 C.R. (4th) 201 illustrates the point. The charge, which was not "screened out" prior to trial, was based on an historical sexual assault. Essentially the Crown's case relied upon only one witness, a 23 year old complainant who testified about events 10 years earlier. There were a number of problems with her evidence, in particular, her accounts were somewhat inconsistent on some issues and there was some suspicion surrounding the circumstances of her eventual disclosure to the police many years after the assault. However, her account was detailed and she had reasonable explanations for the areas of concern about her credibility. The prosecuting Crown Attorney obviously felt that her evidence was reasonably capable of belief and the jury did believe her. They convicted Francois and the Court of Appeal and a majority of the Supreme Court of Canada (in a 4-3 split decision) concluded that the verdict was "reasonable". The fact that three members of the Supreme Court of Canada felt that the verdict was "unreasonable", and hence, that there was no "reasonable" prospect of conviction, illustrates the point that this is a judgment call and not a precise science.. Reasonable people will disagree.

The Supreme Court of Canada's decision in the *Queen* v. *R.C.,* [1993] 2 S.C.R. 226 also provides some guidance, as the uncorroborated evidence of child witnesses, which included some inconsistencies, was held to be a "reasonable" basis for conviction in the particular circumstances of that case.

The proper approach to determining whether a reasonable prospect of conviction exists, when assessing the credibility of the Crown's witnesses, is also assisted by a thorough review of the Martin Committee Report at pages 66-74. In particular, the Committee asserts at pages 68 and 69 that:

> "... the review of credibility or other capacities of witnesses undertaken for purposes of the threshold test should be founded on objective indicators, such as incontrovertible evidence from an independent source that a particular witness is mistaken or lying."

The prosecutor's assessment of credibility, at the charge screening stage, is limited to objective factors such as incontrovertible alibi evidence or a manifestly unreliable witness. Such factors indicate that it would not be reasonable to accept the credibility of the Crown's witnesses. A case that appears otherwise strong may fail the test in the face of irrefutable proof that the accused was elsewhere at the relevant time. Yet one fragile victim/witness may satisfy the standard, for example, a young victim of sexual abuse who is able to give a detailed, believable account of what happened.

In assessing credibility, Crown prosecutors must make every effort to set aside personal views about the demeanour of a witness or about whether that witness will ultimately be disbelieved, if those views are based on conscious or subconscious stereotypes rather than objective facts. Witnesses should not be seen as less credible because of physical or mental disabilities. Children who have been sexually assaulted may suffer from Child Sexual Abuse Accommodation Syndrome which makes the assessment of credibility more difficult and may require expert evidence at trial. The presence of that Syndrome does not make the witness less credible for the purpose of charge screening. On the other hand, it is proper for the prosecutor to taken into account factors such as a witness' history of dishonesty, a strong motive to lie, or an inadequate opportunity to observe, as these are objective indicators relating to credibility that arise from the case itself.

Crown prosecutors should not usurp the function of the judge and jury in making final determinations of credibility whenever there is a conflict in the evidence. That ultimate. task belongs to the judge or jury as the community's decision makers. To assume their function would undermine public confidence in the administration of justice. The screening function is limited to determining whether there is a reasonable basis for accepting the witness' credibility after applying prosecutorial judgment to the objective indicators in the case.

This commentary has focused exclusively on the "reasonable prospect of conviction" branch of our charge screening policy because this is where most of the early debate about the policy because this is where most of the early debate about the policy has been concentrated. However, it should not be forgotten that the second branch of the charge screening policy, namely, the "public interest" test, permits the prosecutor to assess the strengths and weaknesses of the case in a somewhat different fashion in certain circumstances. The relevant parts of CS-1 which address this aspect of the "public interest" are found at paragraph 3(c) as follows:

> c) The following is a list of public interest factors that may be taken into account. No one factor is determinative and it is not an exhaustive list as some cases will raise unique factors:

i) the gravity or triviality of the incident. In determining if an incident is "grave", reference should be made to the Crown Policies found in this Manual, including those on firearms, child abuse, sexual assault. spouse/partner assault, child abduction. drinking/driving offences, gay bashing, and racially motivated crimes;

ii) the strength of the Crown's case, the staleness of the alleged offence, or, the likely length and expense of the trial when considered in relation to the seriousness of the offence. Some cases, for example certain property offences, may be required to meet a higher threshold test, such as a likelihood of conviction, than a serious crime of violence where the lesser threshold set out in paragraph 2 is in the public interest;

In conclusion, we should be clear that all cases we prosecute, including sexual assaults and spousal assaults, must be screened in accordance with the "reasonable prospect of conviction" standard. The personal, professional, or "political" consequences of a conscientious screening decision should never affect a prosecutor's judgment. Since this is an area of discretion where reasonable people will differ, as seven Justices of the Supreme Court of Canada did in *Francois*, it is always advisable to consult with more experienced colleagues when faced with a difficult charge screening decision. None of us would criticize a Crown prosecutor who did this and then exercised his/her best judgment.

Michael Code - ADM - Criminal Law February 3, 1995

APPENDIX E:
(EXAMPLE OF A BROCHURE FOR ACCUSED PERSONS)*

NOTICE TO ACCUSED PERSONS
(Person charged with an offence by the police)

PROVINCIAL COURT (CRIMINAL DIVISION)
FRENCHMAN'S HEAD - LAC SEUL FIRST NATION

Here is a list of the most frequently asked questions by community members about their responsibility in attending court:

What must I do before my first court appearance?
The court will expect you to be able to tell the judge or presiding justice your intentions to either plead guilty or not guilty. If you intend to hire a lawyer the court will expect you to have done so by this time and date or to at least have made an effort to obtain a lawyer.

Who can I talk to in an effort to understand my legal options or what is expected of me?
Mr. Gary Kwandibens has been appointed as the community representative under the Ontario Native Court Work Program and can be reached in Sioux Lookout through the Nishnawbe-Gamik Friendship Centre at telephone 1-807-737-1903. Gary can give guidance and direction for a host of questions which should clarify your concerns.

When does court start?
On your first appearance court starts at 9:30 a.m. with duty counsel available at 9:00 a.m. each court date. This is your opportunity to speak with a legal assistan[t] if you have missed speaking to legal help on advance days [on advance days, duty counsel visits the community to speak with local residents about their court appearances, witness requirements.]

What will happen on my first court appearance?
When your name is called you will have to step forward with your lawyer or duty counsel. The charge will be read to you. If you intend to plead not guilty you should be prepared to set a date for your trial or request an adjournment in order to obtain counsel. If you are charged with an indictable offence and set a date you should be prepared to tell the court which court you elect to be tried in. Your duty counsel or lawyer will assist you with this decision. In any event the judge or presiding justice will ensure you understand BEFORE any decision is reached. If you wish to speak to a lawyer and receive advise, the court will grant an adjournment for [this] purpose.

*All changes to the original text have been placed in square parentheses.

[What if] I do not speak or understand English very well?
The court will provide an interpreter to assist you. Please advise the court prior to your court appearance that you need this service and the language involved. The court can be contacted at 1-807-223-2348 or the Lac Seul Police Service can help you with this request by simply calling 1-807-582-3802.

[What if] I need some advise?
If you intend to hire a lawyer on your own or with the assistance of Legal Aid, you should do so, or make efforts to do so, prior to your first court appearance. Duty counsel is a lawyer provided free of charge on first appearance. [Duty counsel also attends] in the community on "advance days" [the day before court] for assistance. He or she will be available to meet with you at 10:00 a.m. on each advance day and assist you with your decision. PLEASE DO NOT ASK [THE] POLICE FOR ADVICE ON WHETHER TO PLEAD GUILTY OR NOT GUILTY.

[What if] I cannot afford a lawyer?
If you cannot afford a lawyer or legal assistance and want to apply for Legal Aid, please contact your local legal aid office in Sioux Lookout at telephone 1-807-737-1903 and ask for the Ontario Native Court Worker.

[What if] I will be pleading not guilty?
On your first court date you will be asked or your legal help will be asked for dates when you and your legal counsel or assistan[t] are available for trial. If your lawyer cannot attend with you to set a date, bring a letter from your lawyer with the available dates for your trial. If you change your mind after a trial date has been set and you wish to plead guilty call the Lac Seul Police Service [at] 1-807-582-3802. The police will arrange for your case to be brought forward to a date convenient for you and your lawyer.

[What if] I want to pled guilty on my First Appearance?
Please notify duty counsel, who will be available in the courtroom at 9:00 a.m., of your decision and circumstances and your case will be dealt with as soon as possible. Duty counsel can also assist you in deciding whether or not to plead guilty. A Crown Attorney will also be available to discuss your case with the duty counsel or your lawyer on that date as well. If in doubt, please ask the Lac Seul Court Coordinator for directions to speak to these court officials.

What is the case against me?
You and your lawyer can obtain disclosure of the Crown's case against you. Disclosure is provided through the Crown Attorney's office in Dryden, Ontario. An "incident confirmation" containing limited details is also available from the police for a fee of $20.00. Requests must be accompanied by a cheque made payable to the Lac Seul Police Service and can be made in person or in writing at the following address: Lac Seul Police Service, Box 39, Hudson, ON, POV 1X0. Attention: Lac Seul Police Court Coordinator.

Please call the Lac Seul Police Service at 1-807-582-3802 if you have any questions regarding your appearance in court or disclosure requests.

APPENDIX F:
SAMPLE "MEANINGFUL SYNOPSIS"

R. v. Smith and Grant: Conspiracy to Traffic, Trafficking, Possession of Proceeds

Description of Offence

May 3, 1995

12:00 p.m Mr. Smith attended the Airport Customs office in Brampton, ON, to pick up a package that had been shipped from Bangkok. The package was addressed to a Mr. Okre of 543 Staples Road. Mr. Smith identified himself verbally as the consignee, Joseph Okre, to Customs Officer Bev Weir. Officer Weir, suspecting there was a problem, told Smith that the package could not be found and told him to check back the following day. Officer Weir then referred the package for further examination. (Weir)

4 - 10:00 p.m Customs Inspector Audet and Superintendent Lywood examined the aforementioned package. The three ceramic vases contained in the package were X-rayed. A large mass was detected in one of the vases. The mass turned out to be 2.7 kilos of cocaine. The officers contacted Kevin Nicholson of the R.C.M.P., who took control of the drugs. (Audet, Lywood, Nicholson)

Nicholson extracted the heroin from the cases back at his office. Officers Rick Penney and Scott Boyd photographed the extraction process. Officer Nicholson secured the exhibits at approximately 3:00 a.m. on May 4, 1995. (Nicholson, Penney, Boyd)

May 4, 1995

1:14 p.m. Mr. Smith was observed entering the Airport Customs Office in Brampton. Customs Officer Long, acting on Officer Nicholson's instructions, handed the package to Mr. Smith. Mr. Smith signed for it using the name of Joseph Okre. (Nicholson, Long)

1:58 p.m. Mr. Smith was observed entering a cab and was followed to downtown Toronto (Penney).

2:47 p.m. Mr. Smith exited the cab and entered the Mayflower Hotel in downtown Toronto (Penney). Mr. Smith made a telephone call from a pay phone in the lobby (J. Kispal)

3:35 p.m. Mr. Smith waited in the lobby for approximately an hour (J. Kispal). At 3:35 p.m., Mr. Smith met a male in the lobby. The male was approximately 5'4" tall, white, very heavy, wearing a grey suit. Photographs were taken of the meeting by Officer Boyd (Boyd). This man was subsequently identified as Mr. Grant, the co-accused.

Both Mr. Smith and Mr. Grant got on the elevator. They exited the elevator at the fifth floor, where they were placed under arrest by Officers Boyd and Dilk. Officer Dilk searched both accused. Mr. Smith was found in possession of a German passport in his name which indicated that he had entered Canada two days prior to his arrest. Mr. Grant was found (in a hidden pocket) in possession of $50 000 U.S. The money was seized. (Boyd, Dilk and Kispal)

Summary of the Evidence of Each Witness

Witness Name	**Summary of Evidence**
Bev WEIR Customs Officer	On May 3, 1995, Officer Weir observed Mr. Smith entering the Airport Customs Office in Brampton. Mr. Smith identified himself to Officer Weir as Joseph Okre and asked for a package addressed to that name from Bangkok. Officer Wire suspected that there was a problem because of the origins of the package and Mr. Smith's extreme nervousness. Officer Weir told Mr. Smith that the package could not be found and asked him to come back the following day. The package was referred for a secondary examination. Mr. Smith was described as 6'4" tall, weighing approximately 150 pounds, with blond hair, a full beard, and a missing left arm.
Mary AUDET Customs Officer	On May 3, 1995, Officer Audet examined the package which had been referred to her by Officer Weir. Officer Audet opened the package, placed the vases in the X-ray machine and noticed a large mass in one of the vases. With the assistance of Superintendent Lywood, Officer Audet drilled a hole in the vase and removed a white substance that appeared to be cocaine. Officer Audet tested the material and established that it was cocaine. Officer Audet removed the cocaine from the vase.
Helen LYWOOD Superintendent Customs Inspector	On May 3, 1995, Superintendent Lywood observed while Customs Officer Audet examined the aforementioned package. Superintendent Lywood assisted Officer Audet in drilling a hole in one of the vases and observed a white substance flow from the vase. The substance was tested and proved to be cocaine. Superintendent Lywood assisted in removing three plastic bags from inside the vase. The bags were weighed and the total weight was 2.7 kilos. Superintendent Lywood contacted R.C.M.P. officer Nicholson. When Constable Nicholson attended the Customs Office the drugs were given to her.

Elizabeth NICHOLSON
Superintendent
R.C.M.P. Officer

On May 3, 1995, Officer Nicholson received a call from Lywood about a suspected drug seizure. Officer Nicholson attended the Customs Office and received three vases, packaging, and suspected narcotics. Officer Nicholson arranged for the vases to be photographed by Officers Penny and Boyd. Officer Nicholson then placed bags of white sugar in the vase, replaced the vases in the package, and resealed the package. The suspected bags of cocaine were seized.

On May 4, 1995, Officer Nicholson interviewed Customs Officer Weir and was given the following description of Mr. Smith: 6'4", 150 pounds, with blond hair, a full beard, and a missing left arm.

Officer Nicholson gave the reassembled package to Customs Officer Bill Long and instructed him to give it over to Mr. Smith if he asked for it using the name of Joseph Okre. Officer Nicholson gave Officer Long a description of Smith.

On May 4 at approximately 1:14 p.m., Officer Nicholson observed Mr. Smith, who matched Officer Weir's description, attending the Customs Office and receiving the package from Customs Officer Long.

Bill LONG
Customs Officer

On May 4, 1995, received a description of Mr. Smith from RCMP officer Nicholson [Smith described as 6'4", 150 pounds, with blond hair, a full beard and a missing left arm], a package addressed to a Joseph Okre, and was instructed to hand the package over to Smith if he asked for it using the name of Okre.

Smith, who fit description perfectly, arrived at the Customs Office at approximately 1:00 p.m., identified himself verbally as Joseph Okre, and asked for the package. Officer Long gave the package to Smith, who was visibly shaking.

Rose PENNEY
RCMP OFFICER

On May 3, 1995, Officer Penney assisted RCMP officer Boyd in photographing vases and packaging.

On May 4, 1994, Officer Penney observed Mr. Smith, who was correctly described as 6'4", 150 pounds, with blond hair, a full beard and a missing left arm, leave the Customs Office at Pearson Airport and enter a cab. Officer Penney observed the cab drive downtown and stop at the Mayflower Hotel where Mr. Smith was seen exiting the cab.

Jennifer KISPAL RCMP Officer	On May 4, 1995, Officer Kispal observed Mr. Smith, who was 6'4", 150 pounds, with a full beard, blond hair, and a missing left arm, enter the Mayflower Hotel in Toronto and make a call from a pay phone in the lobby. Officer Kispal observed Mr. Smith waiting in the lobby for about an hour.
Alex KISPAL RCMP Officer	On May 4, 1995, Officer Kispal observed Mr. Smith, who was 6'4", 150 pounds, with blond hair, a full beard, and a missing left arm, meet with Mr. Grant, a 5'4", heavy, white male, wearing a grey suit. Officer Kispal observed Mr. Smith and Mr. Grant enter the elevator and saw Officers Body and Dilk run to the stairs. Officer Kispal remained in the lobby.
Peter BOYD RCMP Officer	On May 3, 1995, Officer Boyd assisted Officer Penney in the taking of photographs of the vases and packaging. On May 4, 1995, Officer Boyd observed Mr. Smith [a 6'4" white male, 150 lbs., with blond hair, a beard and a missing left arm] meet with Mr. Grant [a 5'4", heavy, white male wearing a grey suit] in the lobby of the Mayflower Hotel in Toronto. Officer Boyd observed Mr. Smith and Grant enter the elevator. Together with Officer Dilk, Officer Boyd ran up the stairs and arrested Grant and Smith as they exited the elevator on the 5th floor. Observed Officer Dilk search both Smith and Grant. Dilk found a German passport on Smith and cash on Grant. Accepted both exhibits from Dilk.
Peter DILK RCMP Officer	On May 4, 1995, Officer Dilk observed Mr. Smith [a 6'4" male, 150 pounds, with blond hair, a full beard and a missing left arm] meet with Mr. Grant [5'4" white, heavy, male wearing a grey suit] in the lobby of the Mayflower Hotel. Officer Dilk observed the two men entering the elevator and, together with Officer Boyd, ran up the stairs. Mr. Smith and Mr. Grant were observed exiting the elevator at the fifth floor, where they were arrested. Officer Dilk searched both suspects and found a German passport on Smith and $50 000 U.S. on Grant. Both the money and the passport were turned over to Boyd as exhibits.

APPENDIX G:
MODEL DISCLOSURE INDEX / CHECKLIST

Regina vs. _____

I. MATERIALS FOR ALL CHARGES

	For Police Completion		
	Page No.	**N/A**	**Ordered**
Meaningful Synopsis including a description of offence [with evidence sources set out in brackets] and a summary of each witness' evidence.			
Synopsis of Related federal or *Criminal Code* charges			
Information / Indictment			
Court calendar showing witness' availability			
Officers' notes			
Witness statements [written, reduced to writing, audio or video]			
Witness credibility information: ▸ particulars of any promises made by persons in authority; ▸ mental disorder information; ▸ criminal record; ▸ other relevant information.			
Accused's statements [written, reduced to writing, audio or video]			
Victim Impact Statements			
Search Warrant			
Information sworn to obtain Search Warrant			
Grounds for Warrantless Search or Detention			
Copy of any seized documents that will be used at trial			
Occurrence Report			
Supplemental Reports			
CPIC Criminal Record and Outstanding Charges [Accused]			
Record of Arrest, including Synopsis			
Show Cause Documents			
Release Forms			

II. MATERIALS COMMON TO SPECIFIC OFFENCES

A. Drug Charges

	For Police Completion		
	Enclosed	**N/A**	**Ordered**
Property Reports			
Value of seized money / property			
Copy of debt lists			
Weight of exhibits			
Quantitative analysis of drug exhibit for PFTP charges			
Witness statements identifying suspects by name			
Agent disclosure: ▸ signed statement ▸ notes ▸ agreement with police that discloses all benefits provided to agent ▸ criminal record ▸ record of outstanding charges			
Civilian statements used to establish residence			
Copies of seized documents and copies of driver's licence that establish suspect's residence			

B. Impaired / Over 80

	For Police Completion		
	Enclosed	**N/A**	**Ordered**
Breath Technician's check sheet & record			
Certificate of Analysis & Notice of Intention to use at Trial			
Notice of Increased Penalty			
MVC Record			
Video of Impaired Person			
Medical Reports			

C. Driving While Disqualified

	For Police Completion		
	Enclosed	**N/A**	**Ordered**
Certified copy of prohibition order			
Certified copy of MTO order			
Proof that notice of intention and a certified copy of the order were served on accused (investigator / affidavit)			

D. Breach of Probation / Recognizance / Undertaking / Peace Bond / Fail to Comply / Fail to Appear

	For Police Completion		
	Enclosed	**N/A**	**Ordered**
Certified copy of relevant order			
Notice of intention under *Canada Evidence Act* to use certified copy at trial			
Proof that notice of intention and certified copy of the order were served on the accused (investigator / affidavit)			
Certificate of non-attendance			

E. Willful Damage / Mischief to Property

	For Police Completion		
	Enclosed	**N/A**	**Ordered**
Repair estimate / invoices / other expenses			
Goods value / extent of loss			

F. Theft (Retail)

	For Police Completion		
	Enclosed	**N/A**	**Ordered**
Store security report			
Goods value / extent of loss			

G. Assault

	For Police Completion		
	Enclosed	**N/A**	**Ordered**
Photos			
Consent to release medical records			
Doctor / hospital records			

III. SPECIALIZED MATERIALS

	For Police Completion		
	Enclosed	**N/A**	**Ordered**
Medical reports			
Lab reports			
Forensic Reports: ▸ fingerprint analysis; ▸ hair and fiber analysis; ▸ blood typing; ▸ DNA analysis; ▸ other (describe):			
Fingerprint lifted			
Incidental property damage reports			
Print / laser photocopies of photographs of suspects if identity likely to be in issue			
Audio / video tape			
Wiretap authorization			
Identification information			
Print / laser photocopies of line-up sheets			
Copy of cheques (front and back)			
Business records / government records / bank records, with affidavit attesting to same			
Notice that records will be adduced in evidence together with proof of service (section 50)			
Copy of NSF notice			
Statement of person accepting cheque			
Accused's bank records / affidavit			
Affidavit of no account			

V. OTHER INFORMATION REQUESTED BY DEFENCE

Description	For Police Completion		
	Enclosed	N/A	Ordered

VI. DISCLOSURE REFUSED

To be completed where information has been withheld.

A. Nature of Information Withheld

B. Reasons for Withholding Information

C. Name of Crown and supervisor who approved withholding information and date

APPENDIX H:
PROVINCE OF ONTARIO
MINISTRY OF THE ATTORNEY GENERAL

CROWN POLICY MANUAL

Policy No.	Original Date	Update
R-1	January 15, 1994	February 10, 1995

Resolution Discussions

Cross Reference:
Child Abuse - Physical and Sexual
Spouse / Partner Assault
Victims of Crime
Victim / Witness with Special Needs
Sexual Offences
Firearms / Weapons
Disclosure
Charge Screening

A. INTRODUCTION

Resolution discussions are an essential part of the criminal justice system in Ontario. When properly conducted, they provide a form of dispute resolution that can benefit all of the participants in that system including victims, witnesses, the accused, counsel, police and the people of Ontario. The proper administration of justice, including consideration for the public interest, is the primary concern of any resolution discussion.

In conducting resolution discussions, Crown counsel must attempt to balance the interests of the victim, the protection of the public and the rights of the accused in the framework of the optimal use of limited resources.

A reference to the principles set out in the Attorney General's and Deputy Attorney General's statement at the beginning of this Crown Policy Manual, including systemic discrimination, is useful in the context of resolution discussions.

B. DIRECTIVES

There are some fundamental principles of resolution discussions that relate directly to our professional responsibilities and, accordingly, they must be framed as binding directives:

1) Crown counsel must not accept a guilty plea to a charge knowing that the accused is innocent.

2) Crown counsel must not accept a guilty plea to a charge when a material element of that charge can never be proven unless that fact is fully disclosed to the defence.

3) The charges proceeded with on a guilty plea as well as any sentence submissions made by Crown counsel with respect to those charges must adequately reflect the gravity of the provable offence or offences.

4) Crown counsel must not purport to bind the Attorney General's right to appeal any sentence.

5) As a general rule, counsel must honour all agreements reached after resolution discussions. However, on rare occasions it is appropriate for a senior Crown counsel after reviewing an agreement made by a Crown, to repudiate that agreement if the accused can be restored to his / her original position, and if the agreement would bring the administration of justice into disrepute. Any such repudiation must be approved in advance by the Crown Attorney or a Director or a Regional Director.

C. POLICY AND PROCEDURES

The following paragraphs are framed in recognition of the fact that no set of rules can anticipate every situation. They are designed to aid Crown counsel in the exercise of their discretion. It is anticipated that these policies and procedures will give positive assistance to Crown counsel in the vast majority of cases.

Pre-Trial Meetings

1) Prior to a date being set for trial or preliminary hearing, Crown counsel shall use his or her best efforts to confer with defence counsel to discuss matters that will encourage the efficient use of limited resources including:

   a) negotiation of guilty pleas to charges that have been screened, agreement as to the facts and law concerning such charges, and negotiation of the position of Crown counsel on sentence;

b) the identification and narrowing of issues and attendant reduction in the number of witnesses required to attend court at a preliminary inquiry or trial through appropriate admissions by Crown and defence counsel; and

c) any other matters that may affect the efficient disposition of the charges in a manner consistent with the proper administration of justice.

2) Provided that Directive 3 above is complied with and it is in the public interest as defined in the Charge Screening Policy, Crown counsel may:

a) accept a plea to a reduced number of provable charges, and/or accept a plea to a lesser offence;

b) in deciding whether to negotiate in accordance with paragraph 2(a) above, Crown counsel have greater latitude in relation to minor or non-violent offences; and

c) join with the defence to make-a-joint submission on sentence.

3) Where practical, a written record endorsed by all counsel should be maintained in or on the Crown brief of any matters agreed upon as a result of resolution discussions and where practical, a copy of that record should be provided to defence counsel.

4) In all resolution discussions Crown counsel should be mindful of the needs as well as the role of victims. While the victim is = the client of Crown counsel, the victim does have an important stake in the justice system that often, but not always, coincides with the public interest. Wherever appropriate and feasible, given the nature of the charges, Crown counsel personally or through an agent should consult the victim, or someone who speaks on behalf of the victim, prior to concluding resolution discussions. The greater the degree of threat, injury or financial loss, the greater the duty to consult with the victim Crown counsel does not require the approval of the victim to the proposed resolution but should consider the victim's position one of the significant factors in arriving at a just position.

Mitigation for Early Guilty Plea

5) a) An early guilty plea that is acceptable to Crown counsel is a particularly mitigating factor to be taken into account in resolution discussions.

b) As an early guilty plea generally signals remorse and saves resources, it will normally enable Crown counsel to submit to the court the bottom end of the range of sentence

appropriate to that particular offence and offender. In determining the appropriate range of sentence for a particular offence, attention should be paid to those prosecution policies found in this Manual which emphasize the gravity of the offence and the need for sentences that protect the public, including those on firearms, child abuse, sexual assault, spouse/partner assault, child abduction, drinking/driving offences, gay bashing, and racially motivated crimes.

c) There are a limited number of extremely serious prosecution where Crown counsel will be unable to recommend mitigation for an early guilty plea. These circumstances will be rare.

Guilty Plea After Set Date

6) a) After a trial or preliminary hearing date has been set there should be no further resolution discussions covering plea or sentence unless there has been a material change of circumstances. Obviously, discussions designed to narrow issues and facilitate a just proceeding are always appropriate.

b) A material change of circumstances cannot be comprehensively defined but would include factors such as:

- the unavailability of M disclosure to Crown counsel and/or defence counsel prior to the set date;

- a reassessment of the strength of the Crown's case having regard to all the witnesses; or

- a change in the law or a reassessment of the impact of existing law.

7) It is recognized that the earlier in the proceedings that a guilty plea is entered, the greater is the remorse expressed by the accused and the greater is the savings to the administration of justice. It is also recognized that the speedy resolution of criminal charges can bring various forms of relief to victims and witnesses. Accordingly, the earlier that a guilty plea is entered, the greater will be the consideration given to the accused by Crown counsel.

On a trial date or preliminary hearing date, barring a material change of circumstances, Crown counsel shall seek a higher sentence in the appropriate range than that which was offered prior to the. setting of the date. The attendance of witnesses and the scheduling of court time undermines the responsiveness of the justice system, results in both inconvenience to the public and a waste of limited resources, and calls into question the accused's remorse. Accordingly, in that situation, the lower end of the sentence range appropriate to the offence

and the offender should no longer be agreed to by Crown counsel, again, barring a material change of circumstance.

The Facts on a Guilty Plea

8) a) Crown counsel should not withhold from the court any fact that is relevant, material, and provable.

b) In assessing whether a particular fact meets this criteria, Crown counsel may want to take into account factors such as:

- the fragility or strength of the Crown witness required to prove an aggravating fact;
- whether the fact will make a difference in aggravation or mitigation of sentence; or
- whether the disputed fact will take so long to prove and will have such a minimal impact that the procedure would be inconsistent with the rational use of limited resources.

GUIDELINES FOR PROVINCIAL PROSECUTORS at FIRST ATTENDANCE MEETINGS

Introduction

Defendants in designated areas of the province are required to attend (in person or by agent) at the court office indicated on the offence notice to complete and file a notice of intention to appear in court. Defendants may call the court office (within 15 days of service) for an appointment to file this notice. At that time they will be asked if they wish to discuss the charge with a prosecutor. If they do, an appointment will be scheduled some time later to allow for the police notes and other documents to be received by the Prosecutor.

At the meetings, Provincial Prosecutors will be requested to withdraw charges, consent to pleas of guilty to lesser charges or if not resolved, advise the defendant to file his / her Notice of Intention to Appear and receive a trial date or advise the defendant of his / her right to plead guilty with an explanation.

First Attendance Meetings are a significant part of the Provincial Offence System. They provide for charge screening, dispute resolution and disclosure within a single forum. The dual charge screening considerations of reasonable prospect of conviction and the public interest test will also be taken into account at all First Attendance Meetings.

In conducting First Attendance Meetings, Provincial Prosecutors must attempt to balance the interest of any victim, the protection of the public and the rights of the accused in the framework of the optimal use of limited resources.

Threshold Test

When considering whether or not to continue the prosecution of a charge, the prosecutor should determine if there is a reasonable prospect of conviction. See *Crown Policy Manual CS-1, 2(a) and (b) concerning this test.*

Public Interest

If there is a reasonable prospect of conviction, a Provincial Prosecutor should then consider the further public interest test in determining whether the charge should be withdrawn or reduced. *See Crown Policy Manual CS-1, 3(a)(b)(c) concerning this test.*

Directives

1. A Prosecutor must not accept a guilty plea to a charge knowing that the accused is innocent.

2. A Prosecutor must not accept a guilty plea to a charge when a material element of that charge can never be proven unless that fact is fully disclosed to the defendant.

3. The charges proceeded with on a guilty plea as well as any sentence submissions by a Prosecutor must adequately reflect the gravity of the provable offence or offences.

4. A Prosecutor must not purport to bind the Attorney Generals right to appeal any sentence.

5. Provided that directive three above is complied with and it is in the public interest as defined in the Charge Screening Policy, a Prosecutor may:

   (a) accept a plea to a reduced number of provable charges and/or accept a plea to a lesser offence;

   (b) join with the defendant to make a joint submission on sentence after a plea of guilty;

   (c) consider that an early guilty plea is a mitigating factor to be taken into account.

Matters to Avoid at First Attendance Meeting

1. No legal advise should be given, e.g. the possible effects of conviction on a defendant's insurance, the results of a decision to challenge an officer's evidence.

2. The acceptance of a Notice of Intention to appear for later filing. This should be done by the defendant at the court office. A date for the trial can be provided at that time taking into account the defendant's schedule thereby eliminating the need for any adjournment requests.

Conclusions

Any charge that fails to meet the threshold test or is to be discontinued in the public interest must be spoken to in court and brief reasons on the record should accompany a withdrawal, a reduction or a substitution of a charge.

When a charge has been resolved, the prosecutor should communicate with the victim in a case of serious injury or a disability. If the purpose of notifying the witness is to advise him or her that there is no need to attend court, this responsibility can be delegated to the police.

APPENDIX I:
PLEA AND SENTENCE NEGOTIATIONS

DEPARTMENT OF JUSTICE (CANADA)

(January, 1993)

Introduction

Discussions between Crown and defence counsel which are intended to lead to a narrowing of the issues at trial, or which may avoid unnecessary litigation altogether, form an important and necessary part of the criminal justice system. Discussions of this nature will be referred to throughout this chapter as "plea and sentence negotiations". Though not defined in the *Criminal Code,* plea and sentence negotiations embrace several practices: charge negotiations, procedural negotiations, sentence negotiations and negotiations about the facts of the offence.

In this chapter, plea and sentence negotiations can be understood generally as negotiations between Crown and defence counsel to resolve a criminal matter or to recommend to a court how the matter should be conducted or resolved. The negotiations may conclude the criminal matter by deciding the charges on which a plea of guilty will be entered and the position of the Crown on sentence, or settle procedural issues to expedite the trial. Recommendations made to the court as part of a plea or sentence negotiation are, of course, always subject to the overriding discretion of the court to accept or reject any submission by counsel.[1]

Statement of Policy

Crown counsel may initiate plea and sentence negotiations or may respond to them if initiated by the defence providing, in all instances, Crown counsel does not proceed with a plea of guilty if there is reason to believe that the charge approval standard described in Chapter H-1, "The Decision to Prosecute", has not been met. In addition, counsel's approach to plea and sentence negotiations must be based on several important principles: fairness, openness, accuracy, and the interest of the public in the effective and consistent enforcement of the criminal law. The guidelines intended to ensure adherence to these principles are described throughout this chapter.

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[1] *R.* v *Simoneau* (1978), 40 C.C.C. (2d) 307 (Man. CA.).

Guidelines for Application of the Policy

Plea and sentence negotiation practices will vary from jurisdiction to jurisdiction. The following guidelines are not designed to require a set form of plea or sentence negotiations. Instead, they inform counsel of some acceptable and unacceptable negotiating practices.

(i) Charge Negotiations

Charge negotiations may properly include the following:

- reducing a charge to a lesser or included offence;
- withdrawing or staying other charges;
- agreeing not to proceed on a charge or agreeing to stay or withdraw charges against others (for example, friends or family of the accused, or individual corporate officers);
- agreeing to reduce multiple charges to one all-inclusive charge (where permitted by law); and
- agreeing to stay certain counts and proceed on others, and to rely on the material facts that supported the stayed counts as aggravating factors for sentencing purposes.[2]

The following practices are not acceptable:

- instructing or proceeding with unnecessary additional charges to secure a negotiated plea;

[2]Concerning the propriety of this practice, see *R.* v. *Garcia and Silva*, [1970] 3 C.C.C. 124 (Ont. C.A.); *R.* v. *Ness* (1987), 77 A.R. 319 (Alta. C.A.); *R.* v. *Getty* (1990), 104 A.R. ISO (Alta. C.A.).

- agreeing to a plea of guilty to an offence not disclosed by the evidence; or

- agreeing to a plea of guilty to a charge that inadequately reflects the gravity of the accused's provable conduct unless, in exceptional circumstances, the plea is justifiable in terms of the benefit that will accrue to the administration of justice, the protection of society, or the protection of the accused.

(ii) Procedural Negotiations

Procedural negotiations may properly include the following:

- agreeing to proceed summarily instead of by indictment;

- agreeing to dispose of the case at a specified future date if, on the record and in open court, the accused is prepared to waive the right to a trial within a reasonable time; and

- agreeing to the waiver of charges to or from a particular province or territory, or to or from a particular jurisdiction in a province or territory[3].

(iii) Sentence Negotiations

Sentence negotiations may properly include the following:

- a recommendation by Crown counsel for a certain range of sentence or for a specific sentence;

- a joint recommendation for a range of sentence or for a specific sentence;

[3]See Chapter III-3, "Waiver of Charges", for the policy and procedure on waivers.

- an agreement by Crown counsel not to oppose a sentence recommendation by defence counsel which has been disclosed in advance;[4]

- an agreement by Crown counsel not to seek additional optional sentencing measures (for example, prohibition orders, preventive detention, forfeiture). However, Crown counsel cannot negotiate sentencing measures which apply by operation of law;[5]

- an agreement by Crown counsel not to seek more severe punishment by proceeding with a Notice of Intention to Seek Greater Punishment;[6] and

- an agreement by Crown counsel not to oppose the imposition of an intermittent sentence rather than a continuous sentence.

The following practice is not acceptable;

- a promise in advance, not to appeal the sentence imposed at trial.[7]

(iv) Negotiations about the Facts of the Offence

Charges shall proceed on facts that Crown counsel is satisfied can be proved in court. Fact negotiations may properly include the following:

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[4]But see the policy on sentencing outlined in Chapter V-7, "Spousal Assault Prosecutions" and Chapter V-8, "Firearms and Other Offensive Weapons", where Crown counsel should oppose recommendations for absolute or conditional discharges except in exceptional circumstances.

[5]See for example, subsection 100(l) of the Criminal Code which requires a prohibition order for firearms in certain cases.

[6]But see Chapter V-6, "Drive Impaired Cases: Notice to Seek Greater Punishment" and Chapter V-8, "Firearms and Other Offensive Weapons", which set out the policy on seeking greater punishment.

[7]See subparagraph vii(b), "Fairness", regarding appealing from a disposition which accords with a negotiated plea or sentence.

- agreeing not to include in representations to the court embarrassing facts which are of little or no significance to the charge; and

- agreeing to rely on an agreed statement of facts.

The following practices are not acceptable:

- an agreement respecting facts which results in or gives the appearance of misleading the court, such as.

  (a) an agreement not to advise the court of any part of the accused's provable criminal record which is relevant or could assist the court;

  (b) an agreement not to advise the court of the extent of the injury or damages suffered by a victim;

  (c) an agreement to withhold from the court facts that are provable, relevant, and that aggravate the offence; or

  (d) an agreement to outline facts to the court which, when measured against the essential elements of the offence to which the accused has pleaded guilty, would cause the presiding judge to reject the plea in favour of a plea of not guilty.

(v) Unrepresented Accused

Plea or sentence negotiations with an unrepresented accused call for extreme care. In general, Crown counsel should not initiate negotiations with an unrepresented accused; if approached by an accused, however, counsel may negotiate in accordance with this policy.

Crown counsel should first encourage the accused to retain counsel and, where appropriate, advise the accused of the availability of legal aid. If the accused declines to retain counsel, Crown counsel should generally arrange for a third person to be present during negotiations because of the need to maintain an arms-length relationship with the accused. A detailed record should be kept of all discussions. In most instances, a written agreement or written evidence of an agreement[8] will be appropriate. When the case is disposed of in accordance with a negotiated plea or sentence agreement, Crown counsel should tell the judge about the existence of the agreement and that the accused was encouraged to retain counsel but declined to do so.

Crown counsel should not conduct plea or sentence negotiations with an unrepresented accused unless satisfied that the accused has been given full disclosure or is aware of the right to full disclosure[9].

(vi) Accuracy

Crown counsel should maintain a complete record of all plea and sentence negotiations or agreements on the file. This will promote a consistent and informed practice.

(vii) Openness and Fairness

The general principles of openness and fairness apply to all forms of negotiation discussed above. Both principles are explained here.

[8]Such as a memorandum to file or, minimally, a detailed endorsement on the file.

[9]See Chapter II-4, "Pre-Trial Disclosure", on providing disclosure to an unrepresented accused.

(a) Openness

Crown counsel should, where reasonably possible, solicit and weigh the views of those involved in the Crown's case -- in particular, the victim (where there is one) and the investigating agency. However, after consultation, the final responsibility for assessing the appropriateness of a plea agreement rests with Crown counsel.[10] If a plea agreement is reached, counsel should try to ensure that victims and investigating agencies understand the substance of the agreement and the reasoning behind it. The scope of this discussion may, in unusual circumstances, have to be limited by privacy or secrecy considerations in the accused's interest or in the general public interest.

Where a plea or sentence agreement has been reached, counsel should present the proposal to the trial judge in open court and on the record. In certain circumstances, it may be necessary to discuss some aspects of the agreement with the trial judge privately. This should be done only in rare and compelling situations involving facts which in the interest of the public or the accused ought not to be disclosed publicly. Common examples include cases where the accused is terminally ill, or has acted as a confidential informer for the police.[11] It is not acceptable, however, to discuss a plea agreement privately with the trial judge in advance of the hearing to determine the court's reaction to it.[12]

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[10]See chapter I-4, "The Independence of the Attorney General".

[11]Even then, it is preferable to have a court reporter present in chambers so that a complete and accurate record of the discussions can later be made available if necessary.

[12]Pre-plea participation by the trial judge in charge or sentence negotiations has been universally condemned by the courts, and others: *R.* v. *Wood* (1975), 26 C.C.C. (2d) 100 at 108 (Alta. S.C.); *R.* v. *Dubien* (1982), 67 C.C.C. (24) 341 at 346 - 7 (Ont. C.A.); *R.* v. *White* (1982), 39 Nfld. and P.E.I.R. 196 (Nfld, C.A.). Generally, see: G.A. Ferguson, "The Role of the Judge in Plea Bargaining", (1972-3), 15 Crim. L.Q. 26; Law Reform Commission of Canada, Working Paper 60, Plea Discussions and agreements, at 12-15, and Recommendation 4; Curran, "Discussions in the Judges Private Room", [1991] Crim. L R. 79. This does not, however, prevent counsel's participation in a pre-trial conference conducted under section 625.1 of the Criminal *Code*.

(b) Fairness

All negotiated plea or sentence agreements should be honoured by the Crown unless fulfilling the agreement would clearly be contrary to the public interest. For example, Crown counsel must not proceed with an agreement if counsel has reason to believe that the criteria set out in Chapter II-1, "The Decision to Prosecute" have not been met. Additionally, Crown counsel may be justified in refusing to fulfil an agreement if misled about material facts. The decision not to fulfil an agreement should only be made after consultation with, and approval of, the Regional Director.

As well, if counsel disagrees with an agreement earlier reached by a colleague[13], the matter should be referred to the Prosecution Group Head or Regional Director.

If an accused enters a plea based on a negotiated plea or sentence agreement and the court disposes of the case on those terms, no appeal may be undertaken unless exceptional circumstances exist[14] and the Regional Director authorizes the appeal after consultation with the Assistant Deputy Attorney General (Criminal Law).

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[13]In *Santobello* v. *New York* (1971), 404 U.S. 257 (U.S.S.C.), the court held that prosecutors must advise each other of commitments or agreements made with respect to sentencing. The fact that another prosecutor was not a party to the agreement is no excuse for defaulting on the agreement.

[14]See *R.* v. *Wood*, *supra*, note 12 where the court held that the Attorney General is not barred from appealing a sentence based on a position taken at trial by a Crown counsel. And see *R.* v. *Simoneau* (1978), 40 C.C.C. (2d) 307 (Man. C.A.) where the court held that the appellate court will not necessarily hold the Crown to the position it agreed to take at trial but would determine whether the Crown should be bound by that position depending on the circumstances of each case; and *Attorney General of Canada* v. *Roy* (1972), 18 C.R.N.S. 89 (Que. Q.B.): The Crown, on appeal, should not repudiate its position taken at trial except in specific circumstances. The circumstances are as follows:

(a) imposition of an illegal sentence;
(b) misleading of Crown counsel at trial;
(c) public interest in the orderly administration of justice outweighed by gravity of crime and gross insufficiency of sentence.

But see *R.* v. *Agozzino*, [1970] 1 C.C.C. 380 (Ont. C.A.); and *R.* v. *Goodwin* (1981), 43 N.S.R. (2d) 106 (N.S.C.A.) where the courts held that the Crown could not, on appeal, repudiate the position it agreed to take at trial.

APPENDIX J:
RULES OF THE ONTARIO COURT OF JUSTICE
(PROVINCIAL DIVISION)
RULE 27

APPLICATION OF THE RULE

27.01 A pre-hearing conference in respect of a charge contained in an information shall be held by a judge of the court for the court location in the county, district or region in which the information has been sworn, at such time and date and in such place and manner as a judge of the court may direct, or at such further dates, times and places as the judge who presides at the pre-hearing conference may direct.

ATTENDANCE OF COUNSEL OF RECORD AND ACCUSED

Attendance at Conference

27.02 (1) Unless otherwise ordered by a judge in accordance with rule 2.02, the prosecutor and counsel of record for the accused, each fully briefed in respect of the issues to be discussed at the pre-hearing conference, or, in the case of an accused who is not represented by counsel of record, the accused, shall be present at the pre-hearing conference.

Availability of Accused

(2) A judge may require that an accused, represented by counsel of record, be available for consultation with counsel in respect of matters to be considered at the pre-hearing conference and that an investigating officer shall be available for consultation with the prosecutor.

Completion in Draft of Pre-Hearing Conference Report

(3) Prior to attending the Pre-Hearing Conference, the prosecutor and counsel of record for the accused shall jointly prepare in draft a Pre-Hearing Conference Report in Form 14, to be presented to the pre-hearing conference judge.

Completion of Pre-Hearing Conference Report Where Accused Not Represented by Counsel

(4) Where the accused is not represented by counsel, the prosecutor shall complete in draft the Pre-Hearing Conference Report in Form 14.

THE PRE-HEARING CONFERENCE

General Nature of Pre-Hearing Conference

27.03 (1) Unless otherwise ordered by the pre-hearing conference judge in accordance with rule 2.02, a pre-hearing conference shall be an informal meeting conducted in chambers at which a full and free discussion of the issues raised may occur without prejudice to the rights of the parties in any proceedings thereafter taking place.

Specific Inquiries to be Made

(2) Without restricting the generality of rule 27.01 or subrule (1), a pre-hearing conference judge may inquire as to

(a) the extent of disclosure made by the prosecutor and any or further requests therefor by an accused or counsel of record for an accused;

(b) the nature and particulars of any applications to be made at the outset of the proceedings including any

(i) application to contest the laying of the information or any count thereof,

(ii) application to stay or otherwise determine the proceedings prior to plea or the introduction of evidence,

(iii) application to change the venue of trial or adjourn the hearing of the proceeding,

(iv) application to challenge the sufficiency of the information, to order particulars or to amend the information or any count thereof,

(v) application to sever the trial of any count(s) or accused from the trial(s) of any other accused or count,

(vi) application concerning the special pleas of autrefois *acquit,* autrefois *convict* or pardon, and

(vii) application to determine the fitness of an accused to stand trial;

(c) the possibility of resolution of any or all of the issues in the proceedings, including the possible disposition of any or all counts contained in the information whether by plea of guilty or otherwise;

(d) the simplification of such issues as remain to be contested at the proceedings;

(e) the possibility of obtaining admissions and agreements so as to facilitate an expeditious, fair and just determination of the proceedings;

(f) the estimated duration of the proceedings;

(g) the advisability of fixing a date for the commencement of the proceeding; and

(h) any other matter that may assist in promoting a fair, just and expeditious proceeding.

PRE-HEARING CONFERENCE REPORT

Completion of Report

27.04 (1) The pre-hearing conference judge, upon the completion of the hearing, may complete a Pre-Hearing Conference Report in Form 14, a copy of which shall be provided to the prosecutor and counsel of record for the accused, or to the accused if the accused is not represented by counsel of record, and may be provided to the trial judge, together with any materials filed by counsel of record on the pre-hearing conference relating to matters to be raised at trial.

No Disclosure

(2) Except with the express consent of the prosecutor and counsel of record for the accused, the pre-hearing conference judge shall not disclose to the judge presiding at trial any communications or discussion relating to a plea of guilty unless, whether pursuant to subsection 606(4) of the *Code* or otherwise, a plea of guilty will be entered at trial.

OTHER PRE-HEARING CONFERENCES

27.05 Nothing in these rules shall be construed or interpreted so as to preclude a judge of the court from conducting, with the consent of the prosecutor and counsel of record for the accused, such other informal pre-hearing conferences, in addition to the conference provided for in subsection 625.1(1) of the *Code,* upon such terms as the judge deems fit.

RULES OF THE ONTARIO COURT
(GENERAL DIVISION)
RULE 28

WHERE AVAILABLE

28.01 A pre-hearing conference in respect of a charge contained in an indictment shall be held in the county, district or region in which the indictment has been filed, at such time and date and in such place and manner as a judge of the court may direct, or at such further dates, times and places as the judge who presides at the pre-hearing conference may direct.

ATTENDANCE OF SOLICITOR OF RECORD AND ACCUSED

Attendance at Conference
28.02 (1) Unless otherwise ordered by a judge in accordance with rule 2.02, the prosecutor and counsel for the accused, each fully briefed in respect of the issues to be discussed at the pre-hearing conference, or, in the case of an accused who is not represented by a solicitor of record, the accused, shall be present at the pre-hearing conference.

Availability of Accused
(2) A judge may require that an accused, represented by a solicitor of record, be available for consultation with the solicitors in respect of matters to be considered at the pre-hearing conference and that an investigating officer shall be available for consultation with the prosecutor.

Completion in Draft of Pre-Hearing Conference Report
(3) Prior to attending the pre-hearing conference, the prosecutor and the solicitor of record for the accused shall jointly prepare in draft a pre-hearing conference report in Form 17 or 18, to be presented to the pre-hearing conference judge.

Completion of Pre-Hearing Conference Report Where Accused Unrepresented
(4) Where the accused is unrepresented, the prosecutor shall complete in draft the pre-hearing conference report in Form 17 or 18, indicating what he or she anticipates the issues will be at trial.

THE HEARING

General Nature of Conference

28.03 (1) Unless otherwise ordered by the pre-hearing conference judge in accordance with rule 2.02, a pre-hearing conference shall be an informal meeting conducted in chambers at which a full and free discussion of the issues raised may occur without prejudice to the rights of the parties in any proceedings thereafter taking place.

Specific Inquiries to be Made

(2) Without restricting the generality of rule 28.01 or subrule (1), a pre-hearing conference judge may inquire as to

(a) the extent of disclosure made by the prosecutor and any or further requests therefor by an accused or the solicitor of record for an accused;

(b) the nature and particulars of any applications to be made at the outset of the trial proceedings including any

(i) application to contest the validity of the committal proceedings or the preferment of the indictment or any count thereof;

(ii) application to stay or otherwise determine the proceedings prior to plea or the introduction of evidence;

(iii) application to change the venue or adjourn the hearing of the trial;

(iv) application to challenge the sufficiency of the indictment, to order particulars or to amend the indictment or any count thereof;

(v) application to sever the trial of an count(s) or accused from the trial(s) of another or others of them;

(vi) application respecting the composition or selection of the jury;

(vii) application concerning the special pleas of *autrefois acquit, autrefois convict* or pardon; and,

(viii) application to determine the fitness of an accused to stand trial;

(c) the nature and particulars of any applications to be made either at the outset of the trial before any juror on the panel of jurors is called pursuant to subsection 631(3) of the *Code* and in the absence of any such juror or in the absence of the jury after it has

been sworn including any application to introduce evidence the admissibility of which is disputed by the party opposite;

(d) the possibility of resolution of any or all of the issues in the proceedings, including the possible disposition of any or all counts contained in the indictment whether by plea of guilty or otherwise;

(e) the simplification of such issues as remain to be contested at trial;

(f) the possibility of obtaining admissions and agreements so as to facilitate an expeditious, fair and just determination of the proceedings;

(g) the estimated duration of the trial proceedings;

(h) the advisability of fixing a date for the commencement of the trial; and

(i) any other matter that may assist in promoting a fair, just and expeditious trial.

PRE-HEARING CONFERENCE REPORT

Completion of Report

28.04 (1) The pre-hearing conference judge, upon the completion of the hearing, may complete a Pre-Hearing Conference Report in Form 17 or 18, a copy of which shall be provided to the prosecutor and the solicitor of record for the accused, or the accused if he or she is unrepresented by a solicitor of record, and may be provided to the trial judge, together with any materials filed by the solicitor of record on the pre-hearing conference relating to matters to be raised at trial.

No Disclosure

(2) Except with the express consent of the prosecutor and the solicitor of record for the accused, the pre-hearing conference judge shall not disclose to the judge presiding at trial any communications or discussion relating to a plea of guilty unless, whether pursuant to subsection 606(4) of the *Code* or otherwise, a plea of guilty will be entered at trial.

Endorsement on Copy of Indictment

(3) The pre-hearing conference judge, upon the completion of the hearing shall endorse upon a copy of the indictment the date upon which the pre-hearing conference was held and the estimated length of trial proceedings but without reference to any other issues discussed at the prehearing conference.

OTHER PRE-HEARING CONFERENCES

28.05 Nothing in these Rules shall be construed or interpreted so as to preclude a judge of the court from conducting, with the consent of the prosecutor and the solicitor of record for the accused, such other informal pre-hearing conferences, in addition to the conference provided for in subsection 625.1(2) of the *Code,* upon such terms as the judge deems fit.

APPENDIX K:
MODEL PRE-HEARING CONFERENCE REPORT FORM

ONTARIO COURT (PROVINCIAL DIVISION)

Part I: Basic Information (to be completed by counsel)

Name of Accused	Description of Charges	Form of Release	Counsel's Name & Telephone Number

Crown Counsel: _____ Telephone: _____

Date of Offence: _____ First Appearance Date: _____

Date Information Sworn: _____ Date of Pre-Hearing Conference: _____

Type of Proceeding: _____ Expected Length: _____

Re-Election?: _____ Crown Consenting?: _____

Other Pertinent Information: _____

Part II: ***What is the main issue for trial?***

_____

_____

Part III: ***Can the calling of evidence be dispensed with in relation to any of the following?***

☐ Continuity of Physical Evidence ☐ *Canada Evidence Act* Affidavits

☐	Continuity of Documents	☐	Date / Time / Place of 911 Calls
☐	Date / Time / Place of Intercepts	☐	Committal for Trial
☐	Ownership of Property	☐	Nature of Controlled Substance
☐	Quantity of Controlled Substance	☐	DNA Profile
☐	Fingerprints	☐	Identity
☐	Blood Alcohol Content		

Are there any uncontested witnesses? _____

Any other uncontested evidence? _____

Part IV: ***Are there other ways to shorten / simplify the proceedings?***

Is all or some of the evidence suitable for a discovery-type preliminary inquiry? _____

Can any evidence be led by affidavit? _____

Facts admitted by the defence: _____

_____

Facts admitted by the Crown: _____

_____

Part V: ***Disclosure***

☐ Has Crown disclosure been made? ☐ Will there be any defence disclosure?†

Other disclosure issues: _____

_____

† *NOTE: Where defence counsel fails to disclose the curriculum vitae and anticipated evidence of an expert, an adjournment will be granted to the Crown, if one is requested, absent exceptional circumstances.*

Part VI: ***Charter of Rights Issues***

☐ Search and Seizure [s. 8] ☐ Arbitrary Detention [s. 9]

☐ Right to Counsel [s. 10 (b)] ☐ Delay [s. 11(b)]

Other *Charter* issues: _____

_____

Part VII: ***Other Issues:***

Will there be an *O'Connor* Application? _____

Voluntariness of Accused's Statement at issue? _____

Anticipated Pre-Trial Motions / Applications: _____

_____

Anticipated *Voir Dires*: _____

_____

Other Legal / Evidentiary Issues: _____

_____

Dated at _____, Ontario, this _____ day of _____, _____

_____

Judge of the Ontario Court (Provincial Division)

APPENDIX L:
MODEL DISCOVERY PROTOCOL

ONTARIO COURT OF JUSTICE
(PROVINCIAL DIVISION)

B E T W E E N:

HER MAJESTY THE QUEEN

- and -

_____

_____

PROTOCOL FOR THE EXAMINATION UNDER OATH OF CROWN WITNESSES

WHEREAS Counsel for the Crown and Counsel for the Accused agree that the evidence of witnesses in this matter may be taken at an examination under oath, without a judge being present;

AND WHEREAS Counsel for the Crown and Counsel for the Accused have agreed on the witnesses to be examined and the time and place of the examination;

AND WHEREAS Counsel for the Accused agrees that the accused will waive his or her right to a preliminary inquiry and consent to a committal for trial in the Ontario Court of Justice (General Division);

IT IS AGREED THAT:

1. Counsel will examine the following witnesses under oath, at the following date, time, and location:

Witness	Date	Time	Location

2. Counsel may conduct such examination-in-chief, cross-examination, and re-examination as would be conducted at a preliminary inquiry.

3. No judge will be present for the taking of the evidence. The Court will, however, make a judge available to issue advisory rulings in the event of a disagreement between counsel with regard to the propriety of questions, the admissibility of evidence, or any other legal issue that may arise during the course of the discovery process. Counsel undertake to be bound by the rulings of the judge.

4. Counsel for the Accused has explained the discovery process to the accused and the accused has agreed to consent to his or her committal for trial in the Ontario Court of Justice (General Division).

DATED at _____ this _____ day of _____, _____.

_____ Crown Counsel

_____ Counsel for:

_____ Counsel for:

_____
Judge of the Ontario
Court (Provincial Division)

MODEL DISCOVERY PROTOCOL

AGREEMENT OF ACCUSED PERSON

1. I, _____, acknowledge that my counsel, _____, has explained the process of an examination under oath to me. I have indicated to my counsel that I consent to participate in this process.

2. I understand that by consenting to participate in the discovery process I am waiving my right to a preliminary inquiry and that, following the completion of the discovery process, I will proceed directly to trial in the Ontario Court of Justice (General Division).

Signed: _____ _____

Accused Counsel for the Accused

DATED this _____ day of _____, _____.

APPENDIX M:
ALTERNATIVE MEASURES (DIVERSION)

TABLE OF CONTENTS

Department of Justice (Canada)
September, 1997

1. INTRODUCTION

Alternative measures (or diversion as it is sometimes known) is a pre-trial procedure involving the exercise of discretion by Crown counsel not to prosecute an offender. Instead, counsel refers the offender to an individual or agency with the intention of reaching an agreement to deal with the offence outside the judicial process. In appropriate cases, alternative measures may provide greater benefit to the offender, the victim, and society than can the formal criminal process. Indeed, the fundamental principle underlying alternative measures is that criminal proceedings should be used with restraint and only when other less intrusive measures have failed or would be inappropriate. This allows the courts to devote their resources to dealing with serious crime.

The object of alternative measures is to have the offender accept responsibility for the offence without going to trial. Participation in an alternative measures program is voluntary; the offender cannot be forced into it. If the offender complies with the diversion agreement, the Crown relinquishes its right to prosecute the offender for the offence.

Diversion can occur before or after a charge is laid[1]. The policy applies after a charge has been laid, except in provinces where pre-charge screening takes place, where it will apply both pre-charge and post-charge. The policy applies to both adults and young offenders.

2. STATEMENT of POLICY

2.1 General Principles

Diversion is not intended to be available for every offender and every offence. Rather, it is an acknowledgement that in some cases, because of the nature and circumstances of the offence and the offender, the public interest would be better served by a resolution outside of the traditional criminal

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[1] Investigative agencies also "divert" alleged offenders by exercising their discretion not to lay charges. This Policy deals with situations in which Crown counsel play a role in the diversion decision.

process. Generally speaking it will be most suitable for younger offenders and those of previously good character, who have committed minor offences.

2.2 Preconditions to Diversion

Where counsel is considering exercising the discretion to divert an alleged offender, he or she must be satisfied that the following pre-conditions have been met:

- the case meets the criteria in the "Decision to Prosecute" policy[1] (ss. 717(1)(f) and (g), *Criminal Code*, s. 4(1)(f) *Young Offenders Act* (*YOA*);
- the offender has been advised of his or her right to counsel and is aware that he or she does not have to accept diversion (ss 717(1)(c) and (d), *Criminal Code*, ss. 4(1)(c) and (d) *YOA*);
- the offender is willing to acknowledge responsibility for his or her actions (s. 717(1)(e), *Criminal Code*, s4(1)(e) *YOA*);
- a program described in s. 717(1)(a) of the *Criminal Code* or s 4(1)(a) of the *YOA* exists for which this particular offender would be eligible;
- appropriate consultation has been undertaken, where necessary, with victims, investigating authorities[2] or other interested parties, and diversion would be in the interests of society, the offender and the victim (s. 717(1)(b), *Criminal Code*, s 4(1)(b) *YOA*).

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[1]Chapter II-1

[2]Where government departments have compliance programs for regulatory offences, diversion will usually be considered within the context of the program. Crown counsel should bear in mind that many offenders referred for prosecution for having committed regulatory offences will have already been considered inappropriate for participation in a compliance program.

3. GUIDELINES for APPLICATION of POLICY

3.1 The Circumstances of the Offender

The policy is aimed generally at offenders who have not violated the criminal law in the past, and are unlikely to do so in the near future. Crown counsel should consider the following factors in assessing an offender's suitability:

- whether the offender has previously violated the criminal law (including convictions, discharges or diversions) and if so, the date and nature of the violations;
- the offender's remorse (including for example, whether the offender has agreed to fairly compensate any victim(s));
- whether the offender poses a risk to the community;
- whether the offender is facing other criminal charges.

3.2 The Nature of the Offence

As indicated above, the policy is directed at "minor" offences. "Minor" offences include offences that are objectively less serious or potentially serious offences committed in a less serious way. The following factors are relevant in determining seriousness:

- whether the offence is summary or indictable;
- whether a minimum punishment is prescribed;
- whether the offence usually results in a sentence exceeding three months imprisonment;
- the potential or actual harm to the victim(s) or society in general.

As well, Crown counsel must ascertain whether the offence is the subject of other policies which would affect the decision to divert, e.g. "Spousal Assault"[1],"Native Law Issues"[2], "Impaired Driving Cases"[3], "Firearms and Other Offensive Weapons"[4].

3.3 The Circumstances of the Offence

Existence of any of the following circumstances will preclude diversion:

- where the offence involved the use of, or threatened use of, violence reasonably likely to result in harm that is more than merely transient or trifling in nature;
- where a weapon was used or threatened to be used in the commission of the offence;
- where the offence affected the sexual integrity of a person;
- where the offence had a serious impact upon the victim (physical, psychological or financial);
- where the conduct demonstrated sophisticated planning (for example, the offence was part of an ongoing criminal enterprise);
- where a person trafficked in a controlled substance or possessed the substance for the purposes of trafficking, in or near a school, on or near school grounds or in or near any public place usually frequented by persons under the age of 18 years;
- where a person trafficked in a controlled substance, or possessed the substance for the purpose of trafficking, to a person under the age of 18 years;
- where a person used a person under the age of 18 years to commit a drug offence;
- where the motivation for committing a drug offence was primarily profit[1]

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[1]Chapter V-7.

[2]Chapter V-2.

[3]Chapter V-6

[4]Chapter V-8

[1]In unusual circumstances, diversion may be considered despite the presence of this factor. However, authorization must be obtained from the Prosecution Group Head or Regional Director.

4. SUCCESSFUL COMPLETION of the ALTERNATIVE MEASURES PROGRAMS

If the offender successfully completes the diversion program, the criminal charge shall be withdrawn or stayed and not re-instituted. If the criminal charge was already withdrawn or stayed before the offender was diverted, the charge shall not be re-instituted. If charges were not laid before the offender was diverted, Crown counsel shall not institute or proceed with those charges.

5. FAILURE to COMPLETE the ALTERNATIVE MEASURES PROGRAM

If the offender fails to complete the program, criminal proceedings may be instituted or re-instituted. However, before doing so, Crown counsel should determine why the program was not completed and assess the appropriateness of instituting or re-instituting proceedings in light of those facts. The decision to institute or re-institute proceedings will require the authorization of the Prosecution Group Head or Regional Director.

6. YOUNG OFFENDERS

Some special considerations apply to young offenders through the application of the general policy statements set out in s. 3 of the *Young Offenders Act*, and those matters specifically concerning alternative measures set out in s. 4 of the *Act*. Crown counsel is required to keep those matters in mind when considering diversion for young offenders.